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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
THE HONORABLE ROBERT J. BONDS
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2025-000030
CIVIL ACTION NO. 2021-CP-07-01655

Stanley S. Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; Peter Trager, and Vacation Inn, LLC, each both individually and derivatively,

RESPONDENTS,

versus

Sea Pines South Beach Owners' Association, Inc.,

APPELLANT.

RECORD ON APPEAL
VOLUME I OF III (pp. 1-482)

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both individually and derivatively, Plaintiffs/Counterclaim Defendants, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant/Counterclaim Plaintiffs.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action no. 2021-CP-07-01655 **ORDER AND JUDGMENT FROM TRIAL**

This case involves a dispute between Sea Pines South Beach Owners' Association, Inc. (the "Association") and Plaintiff members of the Association who challenge the Association's authority to levy assessments. The case came before the Court for a bench trial on May 3, 2024. Attorneys Ian Ford and Ainsely Tillman of Ford Wallace Thomson LLC presented the case for plaintiffs/counterclaim defendants Stanley S. Stroup as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, Peter Trager, and Vacation Inn, LLC ("Plaintiffs"). Attorneys James Elliott and Evan Carter of Richardson Plowden & Robinson, PA, presented the case for defendant/counterclaim plaintiff the Association, Inc.

Prior to trial, all parties agreed to Joint Stipulations of Facts and Evidence for Purposes of Trial (cited below as the "Stip") and to the authenticity and

admissibility of numerous exhibits that were filed with the Court and are part of the record. The parties also submitted trial briefs and responses, which are part of the record. At trial, both sides made extensive presentations and arguments, and have filed their demonstrative slides with the Court.

The core question in this case is whether the Association under its governing documents and South Carolina law may lawfully assess its members to dredge the Braddock Cove waterways, property that is owned by the State of South Carolina, not by the Association or its members. After considering the pleadings, briefs, stipulations, exhibits, relevant law, arguments of counsel, and all other materials in the record, the Court finds in favor of Plaintiffs. This Order is based on the specific facts and evidence presented at trial, the Court's assessment of the evidence and arguments, and the applicable law. The Court finds the Association may not lawfully assess Plaintiffs for costs of dredging Braddock Cove's boat channels and waterways, and the Court hereby enjoins the Association from levying assessments for this purpose. Further, the Court declares that the Association may not levy annual assessments on Plaintiffs until such time as the Association owns Common Properties, and it hereby enjoins the Association from levying annual assessments until such time as it owns Common Properties. The Association's counterclaims are denied and dismissed for the same reasons.

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FINDINGS OF FACT

This Association was formed in 1969 for the single corporate purpose of "improving, maintaining and operating the common properties of the association" for the benefit of its members, property owners in the South Beach development.[1]

The authority and obligations of the Association and the rights and obligations of owners with respect to property in the South Beach development are stated in the Sea Pines Land Use Covenants filed in 1970 by the developer of South Beach, Lighthouse Beach Company (the "Declaration").[2] Plaintiffs are South Beach property owners[3] and as such are automatically members of the Association.[4]

The Declaration assigns to the Association the duty to manage "Common Properties" and the authority to levy assessments on Owners and their property to pay the costs of management of Common Properties.[5] In return, the Declaration grants Owners an easement of enjoyment in the Common Properties that is appurtenant to their land[6] and the Association's commitment to use assessments

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[1] Exhibit 4 at p. 1, Art. Fourth (Certificate of Incorporation).

[2] Exhibit 1.

[3] Stip. ¶¶ 2-4.

[4] Stip. ¶ 14; Exhibit 1, Art. III, Sec. 1.

[5] Exhibit 1, Third recital; *id.* Art. V, Sec. 2.

[6] Exhibit 1, Art. IV, Sec. 1.

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"exclusively for the improvement, maintenance, and operation of the Common Properties" for Owners' benefit.[7]

The Declaration defines "Common Properties":

> "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are *deeded* to the Association *and* designated in said deed as "*Common Properties*" . . . All Common Properties are to be *devoted to and intended for the common use and enjoyment of the owners of the Properties*, (subject to the fee schedules and operating rules adopted by the Association).[8]

The Declaration contemplated that the developer might someday deed certain properties to the Association as "Common Properties." However, no properties were deeded to the Association by the developer and no properties have ever been deeded to the Association by anyone.[9]

In 1985, the Association obtained a quitclaim deed from Sea Pines Plantation Company (the successor of Lighthouse Beach Company, the developer of South Beach) conveying any interest that Lighthouse Beach Company had in the "waterways, channel markers, salt marsh open space areas, and all of Grantor's right, title and interest, if any, in the navigable waterways of Braddock Cove" to the Association (the "1985 Quitclaim Deed").[10] Because the items described in the quitclaim deed are public waters, submerged land, and tidal land, they belong to

[7] Exhibit 1, Art. V, Sec. 2; Art. I, Sec. 1(c).

[8] Exhibit 1, Art. I, Sec. 1(c) (emphasis added).

[9] Stip. ¶ 18.

[10] Exhibit 2.

the State of South Carolina.[11] Thus, the 1985 Quitclaim deed conveyed no property.

The Declaration further provides that the owner of any property other than the developer who desires to add it to the plan of the covenants and to subject it to the jurisdiction of the Association may file of record a Supplementary Declaration of Covenants and Restrictions "which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property."[12]

No property owner has filed a Supplementary Declaration adding its property to the jurisdiction of the Association. But, at the time the Association obtained the 1985 Quitclaim Deed, it filed a modification to the Declaration (the "1985 Modification") purporting to broaden the definition of "Common Properties" in the Declaration "to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, South Carolina" ("Braddock Cove").[13] The Association has stipulated that it owns no channel markers and that the Braddock Cove boat channels, waterways, and salt marsh open space areas are owned by the State of South Carolina.[14]

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[11] Stip. ¶ 26.

[12] Exhibit 1 at p. 4.

[13] Exhibit 3 at p. 1.

[14] Stip. ¶¶ 26, 27.

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After it obtained the 1985 Quitclaim Deed and recorded the 1985 Modification, the Association joined the South Island Dredging Association ("SIDA"), a voluntary association of Sea Pines property owners that organizes and contracts for dredging in the southern part of Sea Pines Plantation.[15] The Association levied special assessments on its members to pay dredging costs to remove sediment from Braddock Cove in 1999, 2013, and 2018, and committed to pay a share of those dredging costs. Certain areas of Braddock Cove, which were dredged in the past, are shown on the 2013 dredging permit materials issued by the Army Corps of Engineers.[16]

However, the Association also contends that it has no obligation to participate in dredging of Braddock Cove, and it has declined to do so at times. For example, portions of Braddock Cove were dredged in 2023, but the Association's board of directors decided not to participate in that dredging.[17]

PLAINTIFFS' CONTENTIONS

Plaintiffs contend (*inter alia*) that the Association has no authority to impose special dredging assessments on Plaintiffs, because the Braddock Cove waterways were not deeded to the Association and therefore are not "Common Properties" as the term is used in the Association's certificate of incorporation and as it is defined in the Declaration. Further, Plaintiffs contend that the Braddock

[15] Stip. ¶¶ 19, 21; *see also* Exhibit 6 (SIDA Agreement).

[16] Exhibit 7.

[17] Stip. ¶ 23.

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Cove waterways (including its boat channels, waterways, and salt marsh open space areas) are not "Common Properties" because they were not added to the jurisdiction of the Association by a Supplementary Declaration by their owner, the State of South Carolina, as required by the Declaration.

In addition, Plaintiffs contend that the Association had no authority to amend the definition of "Common Properties" in the Declaration, that the Declaration does not authorize special assessments for dredging, that the 1985 Modification did not become effective because the conditions precedent for the effectiveness of amendments were not satisfied, and that the 1985 Modification is unenforceable under South Carolina law because it is unreasonable, indefinite, and against public policy.

The Association acknowledges that does not and has never owned real property.[18] Therefore, Plaintiffs contend that because the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties," the Association has no "Common Properties" to manage and that without properties to manage, the Association has no authority to levy annual or other assessments. Plaintiffs do not seek any remedy with respect to their past transactions with the Association, but only to prevent unauthorized assessments in the future.

[18] Stip. ¶ 18.

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CONCLUSIONS OF LAW and APPLICATION OF THE FACTS TO THE LAW

I. The Association may not levy special assessments to dredge Braddock Cove.

A. The boat channels, waterways, and salt marsh open space areas of Braddock Cove are not "Common Properties" because they are owned by the State of South Carolina and have not been deeded to the Association.

The Declaration states that assessments levied by the Association "shall be used exclusively for the improvement, maintenance, and operation of Common Properties . . . ."[19] "Common Properties" are defined by the Declaration to mean:

> those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties."[20]

Further,

> All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties (subject to the fee schedules and operating rules adopted by the Association).[21]

The Braddock Cove waterways and the salt marsh open space areas adjacent to Braddock Cove have not been deeded by their owner to the Association, nor have they been devoted to and intended for the common use and enjoyment of members of the Association. Although the 1985 Quitclaim Deed purported to

[19] Exhibit 1, Art. V, Sec. 2.

[20] Exhibit 1, Art. I, Sec. 1(c).

[21] *Id*.

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convey these properties to the Association, it conveyed nothing because it was executed by the developer's successor, not by the owner of the properties.

The Braddock Cove waterways and salt marsh open space areas abutting them are public properties owned by the State of South Carolina, and they are dedicated by the State to the use and enjoyment of all members of the public free of charge.[22] The Court finds that the Braddock Cove properties are not "Common Properties" and the Association may not assess Plaintiffs to dredge them.

B. Only the owner of additional property may subject it to the Declaration. The State of South Carolina did not subject its waterways to the Association's jurisdiction. The 1985 Modification purporting to make them the Association's Common Properties was therefore ineffective.

Although it admits it owns no real property, the Association contends that Braddock Cove was "added" to the Association's "Common Property" by the 1985 Modification. Article II, Section 2(b) of the Declaration states the requirements to add property to the terms of the Declaration:

> the *owner* of any property other than the [developer] who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.[23]

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[22] Stip. ¶ 26; S.C. Const. art. XIV § 4; *see also Brownlee v. S.C. Dept. of Health*, 382 S.C. 129, 676 S.E.2d 116, 120-121 (2009) ("Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure . . . Navigable water is protected under state law to ensure public access.").

[23] Exhibit 1, Art. II, Sec. 2(b) (emphasis added).

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Under this provision, only an owner may add property to the South Beach development and subject it to the jurisdiction of the Association. The State of South Carolina, the owner of Braddock Cove, did not file the 1985 Modification, which purports to add the State of South Carolina's boat channels, waterways, and the salt marsh open space areas abutting them to the jurisdiction of the Association.

Instead, the Association purported to subject these properties to its own jurisdiction simply by declaring them to be "Common Properties" in an agreement it made with itself. Under its theory, the Association could unilaterally subject a stranger's property to its jurisdiction and assess Association members to support that property simply by declaring it to be one of the "Common Properties." But under Article II, Section 2(b) of the Declaration, only the owner is authorized to add property to the jurisdiction of the Association. The Association's unilateral attempt to do so by filing the 1985 Modification did not comply with the requirements of Article II, Section 2 (b) of the Declaration and was ineffective. The Court finds that the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties" and the Association may not assess its members to maintain them.

C. The Declaration does not authorize special assessments for dredging.

The Association argues that the 1985 Modification's purported amendment of the Declaration to include the Braddock Cove waterways in the definition of

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"Common Properties" had the additional effect of authorizing special assessments for dredging. But the 1985 Modification did not purport to change Article V, which prescribes and limits the Association's special assessment authority.

Article V, Section 4 of the Declaration states that special assessments may be levied,

> for the purpose of defraying, in whole or in part, the cost of any *construction* or *reconstruction*, *unexpected repair* or *replacement* of a described capital improvement upon the *Common Properties* . . . or *addition* to the *Common Properties*.[24]

Restrictive covenants are strictly construed and this itemized list prohibits the Association from levying special assessments for other purposes.[25] "[T]he maxim 'Expressio unius est exclusio alterius' applies here: 'When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.'"[26]

The Court has examinted the materials presented by the parties and considered the arguments at trial. Based on that, the Court finds that, in this context, the Association's arguments fail. Words used in contracts are interpreted in accordance with their ordinary meanings.[27] "'[D]redging' is the removal of

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[24] Exhibit 1, Art. V, Sec. 4 (emphasis added).

[25] *See, e.g., Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987).

[26] *Evins v. Richland County Historic Preservation Com'n*, 341 S.C. 15, 532 S.E.2d 876 (2000), *quoting Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447, 448 (1933).

[27] *See, e.g., McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220 (Ct. App. 2020); *Cullen v. McNeal*, 702 S.E.2d 378, 390 S.C. 470 (Ct. App. 2010) ("A clear and explicit

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sediments and debris from the bottom of lakes, rivers, harbors, and other water bodies."[28] In contrast, the activities for which special assessments may be levied under the Declaration, relate to activities that are conducted on dry land. Dredging is not among them. None of the specified processes for which special assessments may be levied ("*construction* or *reconstruction*, *unexpected repair* or *replacement*" or "*addition* to the Common Properties") include dredging (emphasis added). "Construction" means "the process, art, or manner of building something."[29] Building something, unlike dredging, is not the removal of something. "Replacement" in the context of the Declaration means "to put something new in the place of."[30] Dredging removes something. It does not replace anything. "Repair" means "1 a.: to restore by replacing a part or putting together what is torn or broken: FIX b.: to restore to a sound or healthy state: RENEW."[31] Although it may be argued that "dredging" is a type of repair that "renews" a waterway, the Declaration's authorization of special assessments for repairs is limited to "unexpected repairs." Dredging is not unexpected. It is a

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contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense.").

[28] *See, e.g.*, NOAA, *What is Dredging?*, National Ocean Service Website https://oceanservice.noaa.gov/facts/dredging.html, 03/07/2021.

[29] "Construction," *Merriam-Webster.com Dictionary,* 02/21/2022.

[30] "Replacement," *Merriam-Webster.com Dictionary,* 02/21/2022.

[31] "Repair," *Merriam-Webster.com Dictionary,* 02/21/2022.

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process required periodically to remove sediment from tidal waterways. The Association recognized this in its Fall 2021 South Beach Newsletter, which stated:

> To maintain adequate depths for boat navigability in Braddock Creek and its marinas they must be dredged periodically to remove pluff mud, which naturally moves in with our tides. The next dredge will be next year, the fall of 2022. The South Island Dredging Association (SIDA), of which our association is a founding member, will initiate the dredge by soliciting bids from dredge contractors, coordinate with federal and state regulators and develop a funding plan.[32]

The Court finds that dredging is not an "unexpected repair." "Addition" in the context of the Declaration is "a part added (as to a building or residential)."[33] Dredging removes sediment and debris, rather than adding material.

In summary, restrictive covenants must be strictly construed with all doubts resolved against the restriction.[34] In interpreting the Declaration the term "dredging" must be given its common meaning. The Court finds that, in this context, "dredging" is not "construction," "replacement," "unexpected repair," or "addition" and that the Declaration does not authorize special assessments to pay for dredging.

D. The Declaration states that amendments do not become effective unless (i) they are recorded at least 60 days before their effective date, and (ii) Association members are given at least 30 days' notice of proposed amendments before acting on them. Neither of these conditions was satisfied with respect to the 1985 Modification and therefore it did not become effective.

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[32] Exhibit 9, *South Beach Newsletter, Fall 2021* at page 7.

[33] "Addition", *Merriam-Webster.com Dictionary*, 02/21/2022.

[34] *See, e.g., Sea Pines Plantation v. Wells, supra.*

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Real property restrictive covenants must be amended according to the procedure for amendment set in their governing documents or the resulting amendment is without effect.[35] In *Queen's Grant II v. Greenwood Development Corp.*,[36] the South Carolina Court of Appeals held that to exercise a reserved right to amend restrictive covenants running with the land, a developer "must strictly comply with the amendment procedure as set forth in the declaration of covenants…."[37] Here, the Association as the developer's designee purported to amend the Declaration,[38] but it failed to strictly comply with the amendment requirements of the Declaration. To become effective, amendments to the Declaration must satisfy the two conditions precedent stated in Article VIII. The first condition is,

> The covenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change. Provided, however, that no such agreement to change shall be effective unless made and recorded sixty (60) days in advance of the effective date of such change . . . .[39]

[35] *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) (amendment provisions must be strictly followed or resulting amendment is unenforceable), *citing Brown v. Bass*, 277 S.E.2d 480, 276 S.C. 211 (1981).

[36] 368 S.C. 342, 628 S.E. 2d 902 (Ct. App. 2006)

[37] *Id.* at 907.

[38] Exhibit 3, recitals.

[39] Exhibit 1, art. VIII.

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The 1985 Modification did not satisfy this condition to amendment. It was signed and "made" October 18, 1985, recorded October 22, 1985, and purported to amend the Declaration "herewith."[40]

Express conditions to the effectiveness of an amendment are strictly construed and literally applied.[41] The Court finds that the 1985 Modification did not become effective because a condition precedent to its effectiveness was not satisfied.

Article VIII, Section 1 of the Declaration contains a second condition precedent which states that an agreement to amend does not become effective,

> unless written notice of the proposed agreement is sent to [members of the Association] at least thirty (30) days in advance of any action taken.[42]

The plain text of the 1985 Modification shows that this mandatory condition precedent to effectiveness was not satisfied. The language purportedly added to the Declaration by the 1985 Modification to show and describe the Braddock Cove properties is incorporated by reference from the 1985 Quitclaim Deed. The 1985 Modification purports to amend the Declaration to state:

> Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985 . . . . [43]

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[40] Exhibit 3 at p. 1.

[41] *See, e.g., Coastal Seafood Co. v. Alcoa*, 381 S.E.2d 502, 298 S.C. 466 (Ct. App. 1989).

[42] Exhibit 1, p. 14.

[43] Exhibit 3, p. 1.

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The language purportedly incorporated in the Declaration was incorporated by reference from a quitclaim deed executed July 15, 1985. The quitclaim deed referred to was executed 19 days before Association members voted on August 3, 1985, to incorporate its language in the 1985 Modification. It is not possible to give 30 days' advance notice of a meeting to approve an amendment that incorporates language from a document that did not exist until 19 days before the meeting was held. The face of the 1985 Modification shows that the 30-day notice condition precedent was not satisfied. Therefore, the 1985 Modification did not become effective.

The Association's failure to satisfy the Declaration's condition precedent that at least 30 days' prior written notice is required for an amendment to become effective also failed to satisfy a condition imposed by South Carolina law that "the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law . . ."[44] Giving 19 days' notice when at least 30 days' notice is required is not strict compliance with the Declaration and does not satisfy a condition for effectiveness imposed by *Queen's Grant II*. The Court finds that the 1985 Modification did not become effective because the notice requirement for amendments required by the Declaration was not strictly followed.

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[44] *Queen's Grant II v. Greenwood Development*, 628 S.E.2d 902, 907, 368 S.C. 342 (Ct. App. 2006) (emphasis added).

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The court in *Queen's Grant II* also conditioned the effectiveness of covenant amendments on satisfying the requirements that "the new or amended covenants must not be unreasonable, indefinite, or contravene public policy." These requirements are discussed next.

E. The 1985 Modification is invalid and unenforceable because it is unreasonable, indefinite, and contravenes public policy.

The *Queen's Grant II* Court stated that amendments to restrictive covenants are unenforceable if they are "unreasonable, indefinite, or contravene public policy."[45] If the 1985 Modification is interpreted to authorize assessments to dredge Braddock Cove's boat channels and waterways, it is ineffective and unenforceable under *Queen's Grant II* and other applicable law.

1. Unreasonable

The 1985 Modification is unreasonable because it is inconsistent with the plan of administration established by the Declaration. The Declaration established a plan based on reciprocal contractual and property law rights and obligations between the Association and Owners with respect to the Common Properties. The Declaration provided that the Association would own and operate the Common Properties "for the common use and enjoyment of the owners of the Properties"[46]

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[45] *Queen Grant II*, 628 S.E.2d at 907.

[46] Exhibit 1, Art. I § 1(c).

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and authorized the Association to assess Owners to pay the expenses of operating these properties.[47]

In return, Owners were granted easements of enjoyment in the Common Properties that were appurtenant to their land,[48] and the Association's corresponding commitment to maintain the Common Properties.[49]

The reciprocal property and contract law relationships between the Association and Owners established by the Declaration with respect to Common Properties disappear under the Association's reading of the 1985 Modification. Under its reading, the Association may levy special assessments to pay for dredging on property it does not own, property it has no obligation to dredge except the obligation it voluntarily assumes from time to time by participating in the South Island Dredging Association's dredging projects, and property that is not devoted to the "common use and enjoyment" of Owners.[50] Owners' rights to enjoy Braddock Cove derive from the State of South Carolina, not the Association, and are rights belonging to all members of the public

The Association's reading of the 1985 Modification would eliminate with respect to Braddock Cove all contractual and property law connections the

[47] Exhibit 1, Art. V § 1.

[48] Exhibit 1, Art. IV § 1.

[49] Exhibit 1, Art. V § 2.

[50] Exhibit 1, Art. I § 1(c).

Declaration establishes between the land burdened and the land benefitted by assessments, except the Owners' obligation to pay dredging assessments.

Under the Association's reading, the "covenant" to pay dredging assessments is not a real covenant at all. It is an obligation imposed on dissenting property owners by the Association to pay to dredge property in which Owners have no devoted legal interest. An amendment that would eviscerate the rights of Owners in Common Properties established by the Declaration is unreasonable.

The problem is, as the court stated in *Armstrong v. Ledges Homeowners' Association,*[51]

> Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain.

The amendment at issue in the *Armstrong* case would have enlarged substantially the list of activities that homeowners could be assessed to support. The court held that an amendment that extended the association's assessment authority far beyond that contemplated by the original declaration was unreasonable and

[51] *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 87, 360 N.C. 547 (N.C. 2006), *cited with approval by Gates at Williams-Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 298, 792 S.E.2d 240, 249 (S.C. Ct. App. 2016).

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unenforceable, concluding, "every amendment must be *reasonable* in light of the contracting parties' original intent."[52]

Here, the original intent was to create a plan of real covenants under which South Beach property owners shared the responsibility to pay to maintain common properties in which they also shared ownership. The Association's interpretation of the 1985 Modification would eliminate the shared-ownership requirement, but extend the shared-obligation requirement by allowing the Association to force dissenting Owners to pay to support the property of a stranger. The 1985 Modification as interpreted by the Association would drastically change the original deal and is unreasonable and unenforceable. Indeed, the Declaration itself prohibits unreasonable amendments to its covenants. Article II, Sections 2(a) and (b) both state that a Supplementary Declaration adding property to the plan of the Declaration may modify covenants, but only "as are not inconsistent with the Plan of this Declaration."[53]

2. Indefinite

The second requirement for effectiveness of an amendment to a restrictive covenant stated by *Queen's Grant II* court is that the amendment must not be indefinite.

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[52] *Id.*(emphasis in original).

[53] Exhibit 1, Art. II §§ 2(a)–(b).

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Affirmative covenants are unenforceable "unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application."[54] It is the duty of courts to interpret standards established by the parties, not to create standards for the parties.

The 1985 Modification purports to create categories of property: water, tideland, and submerged land, which are different from the category created by the Declaration—dry land. The 1985 Modification purported to amend the definition of "Common Properties" to include the Braddock Cove waterways and salt marsh open space areas. But it did not add anything to the assessment terms of the Declaration to state the Association's and its members rights and obligations with respect to the waterways. As interpreted by the Association, the 1985 Modification imposed no obligation to maintain Braddock Cove, but authorized the Association to assess dissenting Owners for any amount, allocated in any way it chose to help pay for maintenance dredging. The Association's argument, that the amendment of a *definition* (1) eliminated the requirement that "Common Properties" must be properties deeded to the Association, and (2) had the effect of authorizing the Association to levy assessments to maintenance dredge Braddock Cove at its option, for any amount, and on any basis approved by three quarters of a quorum of its members, eliminates the certainty and predictability of obligation inherent in the Declaration's original design. The "modified"

[54] *Beech Mountain Prop. Owners' Ass'n v. Seifert*, 269 S.E.2d 178, 183, 48 N.C. App. 286, 294 (N.C. 1980).

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Declaration fails to explain the Association's and its members' rights and obligations with respect to Braddock Cove and, consequently, its assessments for maintenance dredging are unenforceable. As the court stated in *Lovering v. Seabrook Island Property Owners' Association*,[55]

> In order to constitute an enforceable power of assessment in the Association, an assessment provision must: (1) express a sufficiently definite standard by which to measure liability for the assessment; (2) describe with particularity the property to be maintained; and (3) provide an ascertainable standard by which the purpose for which the assessment is levied can be objectively determined. . . . A standard such as "any other thing necessary or desirable in the opinion of the Board of Directors" is too vague to be enforceable.

The Association has no obligations to Owners or third parties with respect to Braddock Cove unless it chooses from time to time to assume them. The Association has no right to regulate the use of Braddock Cove unless it is granted rights by the State of South Carolina. The 1985 Modification gives no guidance as to obligations the Association may assume or the rights it may seek with respect to the Braddock Cove waterways.

And although the property of some Owners borders Braddock Cove, the property of many does not. The 1985 Modification provides no objective standard for allocating the burden of dredging assessments among Owners and, indeed, provides no objective standard for determining whether the Association will participate in maintenance dredging at all.

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[55] 344 S.E.2d 862, 866, 289 S.C. 77 (Ct. App. 1986), *aff'd as modified*, 352 S.E.2d 707, 352 S.E.2d 707, 291 S.C. 201 (1987).

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For example, in 2023, the Association's board decided not to participate the maintenance dredging of Braddock Cove for purely subjective reasons. As it said in its Fall 2022 Newsletter to Owners:

> This Board did not feel that residential members should be required to contribute the same percentages as the commercial members which obtain significantly greater financial benefit from the navigable waterway of Braddock Cove. While we certainly recognize that the dredge of Braddock Cove is a benefit to all of South Beach, and indeed to all of Sea Pines and the Town of Hilton Head, we felt that the residential members were being asked to pay a disproportionate amount, relative to the benefit received. As a result, Braddock Cove will largely be dredged but, as noted, the Upper Creek will not be included. . . .[56]

Decisions based on feelings are not decisions based on an ascertainable standard. As the court stated in *Beech Mountain Property Owners' Ass'n v. Seifert*,[57]

> Obviously, a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard.

The Court finds that the 1985 Modification is indefinite and unenforceable.

3. Public policy

The third requirement for the effectiveness of an amendment of a restrictive covenant stated by the *Queen's Grant II* court is that it must not violate public policy.

a. Touch and concern

[56] Exhibit 35, p. 4 (South Beach Newsletter, Fall 2022).

[57] 269 S.E.2d at 183.

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In the preamble to S.C. Code § 27-1-70, the statute that invalidated restrictive covenants that imposed transfer fees on the sale of real property, the South Carolina General Assembly affirmed the public policy of the State concerning restrictions on the transfer of property, stating:

> the public policy of this State favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the property . . . .[58]

The purported assessment obligation to dredge Braddock Cove does not touch and concern Owners' land because no legal interest in Braddock Cove—the property benefitted by the assessment—is attached to Owners' property. Burdens that do not touch and concern the burdened land are against the public policy of South Carolina.

b. Real covenant

To touch and concern the land, a covenant must be a real covenant. A real covenant by definition is an agreement between landowners respecting the use of their land, burdening the land of one, and benefitting the land of the other.[59] South Carolina appellate cases dealing with real covenants have involved an exchange of promises between the owner of the land burdened by the promise and the

[58] S.C. Code § 27-1-70(B)(1).

[59] 5 *Powell on Real Property* ¶ 670.

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owner of the land benefitted by the promise, or their predecessors in title.[60] In this case, the Declaration is built on real covenants.[61]

A real covenant may be enforced only by the owner of the dominant estate. As the court stated in *Stegall v. Housing Authority,*[62]

> One who seeks to enforce a restrictive covenant "must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder."

Here, there is no real covenant at all because there is no agreement between the Association as representative of the owners of the land burdened by the covenant, and the State of South Carolina, the owner of the land benefitted by the covenant. The State of South Carolina has no statutory, contractual, or property law right to require the Association to dredge Braddock Cove, and the Association has no obligation to the State to dredge Braddock Cove. The Association's obligation to dredge is not attached to the property benefitted by the dredging in any way. Instead, it is simply a contractual obligation to a dredging company that Association has sometimes assumed voluntarily.

Although packaged in the container of a property owners' association and clothed in the language of real covenants, the 1985 Modification as interpreted by

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[60] *See, e.g., Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015) ("Restrictive covenants, sometimes referred to as 'real covenants,' are agreements to do, or refrain from doing, certain things with respect to real property.") (internal quotations omitted).

[61] Exhibit 1, Art. I § 1(c); Art. II §§ 1 & 2; Art. IV § 1; Art. V §§ 1 & 2; Art. VIII § 1.

[62] *Stegall v. Housing Authority of City of Charlotte*, 178 S.E.2d 824, 829, 278 N.C. 95 (N.C. 1971).

the Association is nothing of the sort. Here, the Association is not acting as the owner of a dominant estate to enforce an assessment obligation against servient estates under a real covenant, but as a fundraiser to raise money to dredge Braddock Cove. It is using the coercive authority of a property owners' association, in the guise of enforcing a real covenant, to force dissenting Owners to contribute to a cause that three quarters of a quorum of the Association's members sometimes decide to support.

When a property owners' association ceases to use its assessment authority to support property in which it and its members have a common property interest, it ceases to be a property owners' association and becomes a fundraiser for a cause. The Association may not use assessment authority based on shared interests in property to coerce dissenting property owners to support its chosen cause.

Legally, paying dredging costs is a gratuitous act by the Association for the benefit of the land of a stranger. Under the Association's interpretation of the 1985 Modification, the coercive authority of the Association can be used not only to enforce real covenants, but also to force dissenting members to contribute to a cause supported by a super-majority of members simply because the dissenters happen to own property in the same development.

c. Public property

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The Braddock Cove waterways are public property. As the court stated in *McQueen v. South Carolina Coastal Council*,[63]

> Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State.

And the water itself is public property. Article XIV, Section 4 of the South Carolina Constitution states,

> All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed . . . .[64]

All members of the public are entitled to use and enjoy public waters. Members of the Association have no special rights to use Braddock Cove. The rights they have with respect to Braddock Cove are derived from the State of South Carolina, not the Association. The Association has no obligation to dredge Braddock Cove. Its occasional decisions to dredge are gratuitous. The Association is a private organization, established for the private purpose of managing private property for the benefit of private property owners. The Court finds that the 1985 Modification is against public policy, and unenforceable.

II. The Association has no "Common Properties" and therefore has no authority to levy annual assessments.

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[63] *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116 (2003).

[64] S.C. Const. art. XIV § 4.

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South Carolina's Braddock Cove waterways, boat channels, and salt marsh open space areas are not "Common Properties for the reasons stated above. Further, the Association does not own any real property.[65] The Association's corporate power is limited by its certificate of incorporation to "improving, maintaining and operating the *common properties* of the association."[66] But the Association has no common properties to improve, maintain, or operate. Consequently, there is no authorized purpose for the annual assessments the Association imposes. Without common properties to manage, the Association's levy of annual assessments violates its certificate of incorporation and is *ultra vires.*

Consistent with the limitation on its corporate power contained in its certificate of incorporation, Article V, Section 2 of the Declaration expressly limits the authority of the Association to levy both annual and special assessments: [67]

> Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.

[65] Stip. ¶ 18.

[66] Exhibit 4 (emphasis added).

[67] Exhibit 1, Art. V § 2.

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The Association owns no Common Properties**.** Annual assessments are currently used primarly to pay legal fees, insurance premiums, buy office supplies, and to fund the circular administrative process of collecting next year's annual assessments.[68]

With no Common Properties to manage, it is not possible for the Association to use annual assessments for the sole purpose for which they are authorized: to pay for the management of Common Properties. The Court finds that annual assessments without common properties to manage are *ultra vires* under the Association's certificate of incorporation and beyond its authority under Article V, Section 2 of the Declaration.[69]

CONCLUSION

After careful consideration, based on the specific factual context presented at trial, the Court finds: (1) the Association may not legally assess Plaintiffs for dredging Braddock Cove's boat channels and waterways, and enjoining the Association from levying assessments for this purpose; and (2) the Association may not levy annual assessments on Plaintiffs until such time as it owns Common Properties, and enjoining the Association from levying annual assessments on them until such time as it owns Common Properties. The Association's counterclaims are denied and dismissed for the same reasons.

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[68] Exhibit 34, Association financials.

[69] *See* S.C. Code § 33-31-304 (ultra vires acts); *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 605, 538 S.E.2d 15 (Ct. App. 2000) ("acts beyond the scope of the powers so granted are ultra vires. . . .").

So ordered this ___ day of _____, 2024.

Robert J. Bonds
Circuit Court Judge

[Electronic signature appears on next page]

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Beaufort Common Pleas

Case Caption: Stanley S Stroup , plaintiff, et al VS Sea Pines South Beach Owners Association Inc

Case Number: 2021CP0701655

Type: Order/Judgment and Form 4

So Ordered

s/ Robert Bonds, 2770

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both individually and derivatively, Plaintiffs/Counterclaim Defendants, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant/Counterclaim Plaintiffs.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action no. 2021-CP-07-01655 **ORDER DENYING DEFENDANT'S RULE 59(e) MOTION TO RECONSIDER AND MODIFYING JUDGMENT**

Defendant has filed a Rule 59(e) Motion to Alter or Amend Judgment or Reconsider, requesting that the Court alter or amend the Court's Order and Judgment from Trial (docketed July 22, 2024). The motion has been fully briefed and the Court held a hearing on November 5, 2024. The Court has considered the submitted papers, the case file, the arguments of counsel, and the relavant law. For the reasons set forth below, the Court denies the the motion to reconsider and modifies its July 22, 2024 Order as set forth below.

This case involves a dispute between Sea Pines South Beach Owners' Association, Inc. (the "Association") and Plaintiff members of the Association who challenge the Association's authority to levy assessments. The case came before the Court for a bench trial on May 3, 2024. Attorneys Ian Ford and Ainsely Tillman

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of Ford Wallace Thomson LLC presented the case for plaintiffs/counterclaim defendants Stanley S. Stroup as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, Peter Trager, and Vacation Inn, LLC ("Plaintiffs"). Attorneys James Elliott and Evan Carter of Richardson Plowden & Robinson, PA, presented the case for defendant/counterclaim plaintiff, the Association.

Prior to trial, all parties agreed to Joint Stipulations of Facts and Evidence for Purposes of Trial (cited below as the "Stip") and to the authenticity and admissibility of numerous exhibits that were filed with the Court and are part of the record. The parties also submitted trial briefs and responses, which are part of the record. At trial, both sides made extensive presentations and arguments, and have filed their demonstrative slides with the Court.

The core question in this case is whether the Association under its governing documents and South Carolina law may lawfully assess its members to dredge the Braddock Cove waterways, property that is owned by the State of South Carolina, not by the Association or its members. After considering the pleadings, briefs, stipulations, exhibits, relevant law, arguments of counsel, and all other materials in the record, the Court found in favor of Plaintiffs. The Court's Order is based on the specific facts and evidence presented at trial, the Court's assessment of the evidence and arguments, and the applicable law. The Court found that the Association may not lawfully assess Plaintiffs for costs of dredging Braddock Cove's boat channels and waterways, and the Court enjoined the Association from levying assessments for this purpose. Further, the Court

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declared that the Association may not levy annual assessments on Plaintiffs until such time as the Association owns Common Properties, and it enjoined the Association from levying annual assessments until such time as it owns Common Properties. The Association's counterclaims were denied and dismissed for the same reasons.

FINDINGS OF FACT

This Association was formed in 1969 for the single corporate purpose of "improving, maintaining and operating the common properties of the association" for the benefit of its members, property owners in the South Beach development.[1]

The authority and obligations of the Association and the rights and obligations of owners with respect to property in the South Beach development are stated in the Sea Pines Land Use Covenants filed in 1970 by the developer of South Beach, Lighthouse Beach Company (the "Declaration").[2] Plaintiffs are South Beach property owners[3] and as such are automatically members of the Association.[4]

The Declaration assigns to the Association the duty to manage "Common Properties" and the authority to levy assessments on Owners and their property

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[1] Exhibit 4 at p. 1, Art. Fourth (Certificate of Incorporation).

[2] Exhibit 1.

[3] Stip. ¶¶ 2-4.

[4] Stip. ¶ 14; Exhibit 1, Art. III, Sec. 1.

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to pay the costs of management of Common Properties.[5] In return, the Declaration grants Owners an easement of enjoyment in the Common Properties that is appurtenant to their land[6] and the Association's commitment to use assessments "exclusively for the improvement, maintenance, and operation of the Common Properties" for Owners' benefit.[7]

The Declaration defines "Common Properties":

> "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are *deeded* to the Association *and* designated in said deed as "*Common Properties*" . . . All Common Properties are to be *devoted to and intended for the common use and enjoyment of the owners of the Properties*, (subject to the fee schedules and operating rules adopted by the Association).[8]

The Declaration contemplated that the developer would deed certain properties to the Association as "Common Properties." However, no properties were deeded to the Association by the developer and no properties have ever been deeded to the Association by anyone.[9]

In 1985, the Association obtained a quitclaim deed from Sea Pines Plantation Company (the successor of Lighthouse Beach Company, the developer of South Beach) conveying any interest that Lighthouse Beach Company had in the "waterways, channel markers, salt marsh open space areas, and all of Grantor's

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[5] Exhibit 1, Third recital; *id.* Art. V, Sec. 2.

[6] Exhibit 1, Art. IV, Sec. 1.

[7] Exhibit 1, Art. V, Sec. 2; Art. I, Sec. 1(c).

[8] Exhibit 1, Art. I, Sec. 1(c) (emphasis added).

[9] Stip. ¶ 18.

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right, title and interest, if any, in the navigable waterways of Braddock Cove" to the Association (the "1985 Quitclaim Deed").[10] Because the items described in the quitclaim deed are public waters, submerged land, and tidal land, they belong to the State of South Carolina.[11] Thus, the 1985 Quitclaim deed conveyed no property.

The Declaration further provides that the owner of any property other than the developer who desires to add it to the plan of the covenants and to subject it to the jurisdiction of the Association may file of record a Supplementary Declaration of Covenants and Restrictions "which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property."[12]

No property owner has filed a Supplementary Declaration adding its property to the jurisdiction of the Association. But, at the time the Association obtained the 1985 Quitclaim Deed, it filed a modification to the Declaration (the "1985 Modification") purporting to broaden the definition of "Common Properties" in the Declaration "to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation,

[10] Exhibit 2.

[11] Stip. ¶ 26.

[12] Exhibit 1 at p. 4.

Hilton Head Island, South Carolina" ("Braddock Cove").[13] The Association has stipulated that it owns no channel markers and that the Braddock Cove boat channels, waterways, and salt marsh open space areas are owned by the State of South Carolina.[14]

After it obtained the 1985 Quitclaim Deed and recorded the 1985 Modification, the Association joined the South Island Dredging Association ("SIDA"), a voluntary association of Sea Pines property owners that organizes and contracts for dredging in the southern part of Sea Pines Plantation.[15] The Association levied special assessments on its members to pay dredging costs to remove sediment from Braddock Cove in 1999, 2013, and 2018, and committed to pay a share of those dredging costs. Certain areas of Braddock Cove, which were dredged in the past, are shown on the 2013 dredging permit materials issued by the Army Corps of Engineers.[16]

However, the Association also contends that it has no obligation to participate in dredging of Braddock Cove, and it has declined to do so at times. For example, portions of Braddock Cove were dredged in 2023, but the Association's board of directors decided not to participate in that dredging.[17]

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[13] Exhibit 3 at p. 1.

[14] Stip. ¶¶ 26, 27.

[15] Stip. ¶¶ 19, 21; *see also* Exhibit 6 (SIDA Agreement).

[16] Exhibit 7.

[17] Stip. ¶ 23.

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PLAINTIFFS' CONTENTIONS

Plaintiffs contend (*inter alia*) that the Association has no authority to impose special dredging assessments on Plaintiffs, because the Braddock Cove waterways were not deeded to the Association and therefore are not "Common Properties" as the term is used in the Association's certificate of incorporation and as it is defined in the Declaration. Further, Plaintiffs contend that the Braddock Cove waterways (including its boat channels, waterways, and salt marsh open space areas) are not "Common Properties" because they were not added to the jurisdiction of the Association by a Supplementary Declaration by their owner, the State of South Carolina, as required by the Declaration.

In addition, Plaintiffs contend that the Association had no authority to amend the definition of "Common Properties" in the Declaration, that the Declaration does not authorize special assessments for dredging, that the 1985 Modification did not become effective because the conditions precedent for the effectiveness of amendments were not satisfied, that the 1985 Modification is unenforceable under South Carolina law because it is unreasonable, indefinite, and against public policy, and that if the 1985 Modification did become effective, it did not eliminate the Declaration's requirement that "Common Properties" must be properties deeded to the Association..

The Association acknowledges that does not and has never owned real property.[18] Therefore, Plaintiffs contend that because the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties," the Association has no "Common Properties" to manage and that without properties to manage, the Association has no authority to levy annual or other assessments. Plaintiffs do not seek any remedy with respect to their past transactions with the Association, but only to prevent unauthorized assessments in the future.

[18] Stip. ¶ 18.

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CONCLUSIONS OF LAW and APPLICATION OF THE FACTS TO THE LAW

I. The Association may not levy special assessments to dredge Braddock Cove.

A. The boat channels, waterways, and salt marsh open space areas of Braddock Cove are not "Common Properties" because they are owned by the State of South Carolina and have not been deeded to the Association.

The Declaration states that assessments levied by the Association "shall be used exclusively for the improvement, maintenance, and operation of Common Properties . . . ."[19] "Common Properties" are defined by the Declaration to mean:

> those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties."[20]

Further,

> All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties (subject to the fee schedules and operating rules adopted by the Association).[21]

The Braddock Cove waterways and the salt marsh open space areas adjacent to Braddock Cove have not been deeded by their owner to the Association, nor have they been devoted to and intended for the common use and enjoyment of members of the Association. Although the 1985 Quitclaim Deed purported to

[19] Exhibit 1, Art. V, Sec. 2.

[20] Exhibit 1, Art. I, Sec. 1(c).

[21] *Id*.

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convey these properties to the Association, it conveyed nothing because it was executed by the developer's successor, not by the owner of the properties.

The Braddock Cove waterways and salt marsh open space areas abutting them are public properties owned by the State of South Carolina, and they are dedicated by the State to the use and enjoyment of all members of the public free of charge.[22] The Court finds that the Braddock Cove properties are not "Common Properties" and the Association may not assess Plaintiffs to dredge them.

B. Only the owner of additional property may subject it to the Declaration. The State of South Carolina did not subject its waterways to the Association's jurisdiction. The 1985 Modification purporting to make them the Association's Common Properties was therefore ineffective.

Although it admits it owns no real property, the Association contends that Braddock Cove was "added" to the Association's "Common Property" by the 1985 Modification. Article II, Section 2(b) of the Declaration states the requirements to add property to the terms of the Declaration:

> the *owner* of any property other than the [developer] who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.[23]

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[22] Stip. ¶ 26; S.C. Const. art. XIV § 4; *see also Brownlee v. S.C. Dept. of Health*, 382 S.C. 129, 676 S.E.2d 116, 120-121 (2009) ("Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure . . . Navigable water is protected under state law to ensure public access.").

[23] Exhibit 1, Art. II, Sec. 2(b) (emphasis added).

Under this provision, only an owner may add property to the South Beach development and subject it to the jurisdiction of the Association. The State of South Carolina, the owner of Braddock Cove, did not file the 1985 Modification, which purports to add the State of South Carolina's boat channels, waterways, and the salt marsh open space areas abutting them to the jurisdiction of the Association.

Instead, the Association purported to subject these properties to its own jurisdiction simply by declaring them to be "Common Properties" in an agreement it made with itself. Under its theory, the Association could unilaterally subject a stranger's property to its jurisdiction and assess Association members to support that property simply by declaring it to be one of the "Common Properties." But under Article II, Section 2(b) of the Declaration, only the owner is authorized to add property to the jurisdiction of the Association. The Association's unilateral attempt to do so by filing the 1985 Modification did not comply with the requirements of Article II, Section 2 (b) of the Declaration and was ineffective. Further, even if effective "to include" the Braddock Cove waterways in the definition of "Common Properties," the 1985 Modification did not purport to change the additional requirements in the definition that "Common Properties" must be "deeded to the Association" and that "[a]ll Common Properties are to be

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devoted to and intended for the common use and enjoyment of the owners of the Properties…." [24]

The Court finds that the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties" and the Association may not assess its members to maintain them.

C. The Declaration does not authorize special assessments for dredging.

The Association argues that the 1985 Modification's purported amendment of the Declaration to include the Braddock Cove waterways in the definition of "Common Properties" had the additional effect of authorizing special assessments for dredging. But the 1985 Modification did not purport to change Article V, which prescribes and limits the Association's special assessment authority.

Article V, Section 4 of the Declaration states that special assessments may be levied,

> for the purpose of defraying, in whole or in part, the cost of any *construction* or *reconstruction*, *unexpected repair* or *replacement* of a described capital improvement upon the *Common Properties* . . . or *addition* to the *Common Properties*.[25]

Restrictive covenants are strictly construed and this itemized list prohibits the Association from levying special assessments for other purposes.[26] "[T]he maxim

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[24] Exhibit 1, Art. I(c) (definition of "Common Properties").

[25] Exhibit 1, Art. V, Sec. 4 (emphasis added).

[26] *See, e.g., Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987).

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'Expressio unius est exclusio alterius' applies here: 'When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.'"[27]

The Court has examinted the materials presented by the parties and considered the arguments at trial. Based on that, the Court finds that, in this context, the Association's arguments fail. Words used in contracts are interpreted in accordance with their ordinary meanings.[28] "'[D]redging' is the removal of sediments and debris from the bottom of lakes, rivers, harbors, and other water bodies."[29] In contrast, the activities for which special assessments may be levied under the Declaration, relate to activities that are conducted on dry land. Dredging is not among them. None of the specified processes for which special assessments may be levied ("*construction* or *reconstruction*, *unexpected repair* or *replacement*" or "*addition* to the Common Properties") include dredging (emphasis added). "Construction" means "the process, art, or manner of building something."[30] Building something, unlike dredging, is not the removal of

[27] *Evins v. Richland County Historic Preservation Com'n*, 341 S.C. 15, 532 S.E.2d 876 (2000), *quoting Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447, 448 (1933).

[28] *See, e.g., McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292, 838 S.E.2d 220 (Ct. App. 2020); *Cullen v. McNeal*, 702 S.E.2d 378, 390 S.C. 470 (Ct. App. 2010) ("A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense.").

[29] *See, e.g.*, NOAA, *What is Dredging?*, National Ocean Service Website https://oceanservice.noaa.gov/facts/dredging.html, 03/07/2021.

[30] "Construction," *Merriam-Webster.com Dictionary,* 02/21/2022.

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something. "Replacement" in the context of the Declaration means "to put something new in the place of."[31] Dredging removes something. It does not replace anything. "Repair" means "1 a.: to restore by replacing a part or putting together what is torn or broken: FIX b.: to restore to a sound or healthy state: RENEW."[32] Although it may be argued that "dredging" is a type of repair that "renews" a waterway, the Declaration's authorization of special assessments for repairs is limited to "unexpected repairs." Dredging is not unexpected. It is a process required periodically to remove sediment from tidal waterways. The Association recognized this in its Fall 2021 South Beach Newsletter, which stated:

> To maintain adequate depths for boat navigability in Braddock Creek and its marinas they must be dredged periodically to remove pluff mud, which naturally moves in with our tides. The next dredge will be next year, the fall of 2022. The South Island Dredging Association (SIDA), of which our association is a founding member, will initiate the dredge by soliciting bids from dredge contractors, coordinate with federal and state regulators and develop a funding plan.[33]

The Court finds that dredging is not an "unexpected repair." "Addition" in the context of the Declaration is "a part added (as to a building or residential)."[34] Dredging removes sediment and debris, rather than adding material.

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[31] "Replacement," *Merriam-Webster.com Dictionary,* 02/21/2022.

[32] "Repair," *Merriam-Webster.com Dictionary,* 02/21/2022.

[33] Exhibit 9, *South Beach Newsletter, Fall 2021* at page 7.

[34] "Addition", *Merriam-Webster.com Dictionary,* 02/21/2022.

In summary, restrictive covenants must be strictly construed with all doubts resolved against the restriction.[35] In interpreting the Declaration the term "dredging" must be given its common meaning. The Court finds that, in this context, "dredging" is not "construction," "replacement," "unexpected repair," or "addition" and that the Declaration does not authorize special assessments to pay for dredging.

[35] *See, e.g., Sea Pines Plantation v. Wells, supra.*

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D. The Declaration states that amendments do not become effective unless (i) they are recorded at least 60 days before their effective date, and (ii) Association members are given at least 30 days' notice of proposed amendments before acting on them. Neither of these conditions was satisfied with respect to the 1985 Modification and therefore it did not become effective.

Real property restrictive covenants must be amended according to the procedure for amendment set in their governing documents or the resulting amendment is without effect.[36] In *Queen's Grant II v. Greenwood Development Corp.*,[37] the South Carolina Court of Appeals held that to exercise a reserved right to amend restrictive covenants running with the land, a developer "must strictly comply with the amendment procedure as set forth in the declaration of covenants…."[38] Here, the Association as the developer's designee purported to amend the Declaration,[39] but it failed to strictly comply with the amendment requirements of the Declaration. To become effective, amendments to the Declaration must satisfy the two conditions precedent stated in Article VIII. The first condition is,

> The covenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change. Provided, however, that no such agreement to change shall

[36] *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) (amendment provisions must be strictly followed or resulting amendment is unenforceable), *citing Brown v. Bass*, 277 S.E.2d 480, 276 S.C. 211 (1981).

[37] 368 S.C. 342, 628 S.E. 2d 902 (Ct. App. 2006)

[38] *Id.* at 907.

[39] Exhibit 3, recitals.

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> be effective unless made and recorded sixty (60) days in advance of the effective date of such change . . . .[40]

The 1985 Modification did not satisfy this condition to amendment. It was signed and "made" October 18, 1985, recorded October 22, 1985, and purported to amend the Declaration "herewith."[41]

Express conditions to the effectiveness of an amendment are strictly construed and literally applied.[42] The Court finds that the 1985 Modification did not become effective because a condition precedent to its effectiveness was not satisfied.

Article VIII, Section 1 of the Declaration contains a second condition precedent which states that an agreement to amend does not become effective,

> unless written notice of the proposed agreement is sent to [members of the Association] at least thirty (30) days in advance of any action taken.[43]

The plain text of the 1985 Modification shows that this mandatory condition precedent to effectiveness was not satisfied. The language purportedly added to the Declaration by the 1985 Modification to show and describe the Braddock Cove properties is incorporated by reference from the 1985 Quitclaim Deed. The 1985 Modification purports to amend the Declaration to state:

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[40] Exhibit 1, art. VIII.

[41] Exhibit 3 at p. 1.

[42] *See, e.g., Coastal Seafood Co. v. Alcoa*, 381 S.E.2d 502, 298 S.C. 466 (Ct. App. 1989).

[43] Exhibit 1, p. 14.

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> Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985 . . . . [44]

The language purportedly incorporated in the Declaration was incorporated by reference from a quitclaim deed executed July 15, 1985. The quitclaim deed referred to was executed 19 days before Association members voted on August 3, 1985, to incorporate its language in the 1985 Modification. It is not possible to give 30 days' advance notice of a meeting to approve an amendment that incorporates language from a document that did not exist until 19 days before the meeting was held. The face of the 1985 Modification shows that the 30-day notice condition precedent was not satisfied. Therefore, the 1985 Modification did not become effective.

The Association's failure to satisfy the Declaration's condition precedent that at least 30 days' prior written notice is required for an amendment to become effective also failed to satisfy a condition imposed by South Carolina law that "the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law . . ."[45] Giving 19 days' notice when at least 30 days' notice is required is not strict compliance with the Declaration and does not satisfy a condition for effectiveness

[44] Exhibit 3, p. 1.

[45] *Queen's Grant II v. Greenwood Development*, 628 S.E.2d 902, 907, 368 S.C. 342 (Ct. App. 2006) (emphasis added).

imposed by *Queen's Grant II*. The Court finds that the 1985 Modification did not become effective because the notice requirement for amendments required by the Declaration was not strictly followed.

E. South Carolina non-profit corporation law

In its motion, the Association states "[t]his Court's order does not reference Section 33-31-302 of the South Carolina Code, which broadly enumerates, without limitation, various of the powers held by non-profit corporations, like the Association," and argues that this provision shows that "[t]hese Covenants and Modification are clearly lawful."[46]

This argument is incorrect in the specific context. Irrespective of a nonprofit corporation's power to enter into lawful contracts, all corporations are bound by the terms of the contracts they actually make. Here, the contract between Plaintiffs and the Association does not authorize the Association to collect assessments except to manage "Common Properties." The Association has no "Common Properties"—it owns no real property at all.[47] The power of a corporation to enter into lawful contracts has no bearing on the interpretation of the contracts at issue in this case.

[46] Mot. at p. 10.

[47] Jt. Stip. of Facts ¶ 18.

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Further, a nonprofit corporation's authority to exercise statutory corporate powers may be limited by its certificate of incorporation.[48] Here, the Association's certificate of incorporation limits its authority to "improving, maintaining and operating the common properties of the association . . . ."[49] Again, there are no "common properties of the association." Consequently, its assessment levies are *ultra vires*.[50]

F. The 1985 Modification is invalid and unenforceable because it is unreasonable, indefinite, and contravenes public policy.

The *Queen's Grant II* Court stated that amendments to restrictive covenants are unenforceable if they are "unreasonable, indefinite, or contravene public policy."[51] If the 1985 Modification is interpreted to authorize assessments to dredge Braddock Cove's boat channels and waterways, it is ineffective and unenforceable under *Queen's Grant II* and other applicable law.

1. Unreasonable

The 1985 Modification is unreasonable because it is inconsistent with the plan of administration established by the Declaration. The Declaration established a plan based on reciprocal contractual and property law rights and obligations

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[48] *See, e.g.*, S.C. Code §§ 33-31-206(b); 33-31-301; 33-31-302.

[49] Ex. 4 at p. 1.

[50] The *ultra vires* issue has been extensively briefed and argued, and the Court finds Plaintiffs' arguments on this point to be correct in this context (*see*, *e.g.*, Plaintiffs' Trial Brief pp. 43–44).

[51] *Queen Grant II*, 628 S.E.2d at 907.

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between the Association and Owners with respect to the Common Properties. The Declaration provided that the Association would own and operate the Common Properties "for the common use and enjoyment of the owners of the Properties"[52] and authorized the Association to assess Owners to pay the expenses of operating these properties.[53]

In return, Owners were granted easements of enjoyment in the Common Properties that were appurtenant to their land,[54] and the Association's corresponding commitment to maintain the Common Properties.[55]

The reciprocal property and contract law relationships between the Association and Owners established by the Declaration with respect to Common Properties disappear under the Association's reading of the 1985 Modification. Under its reading, the Association may levy special assessments to pay for dredging on property it does not own, property it has no obligation to dredge except the obligation it voluntarily assumes from time to time by participating in the South Island Dredging Association's dredging projects, and property that is not devoted to the "common use and enjoyment" of Owners.[56] Owners' rights to

[52] Exhibit 1, Art. I § 1(c).

[53] Exhibit 1, Art. V § 1.

[54] Exhibit 1, Art. IV § 1.

[55] Exhibit 1, Art. V § 2.

[56] Exhibit 1, Art. I § 1(c).

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enjoy Braddock Cove derive from the State of South Carolina, not the Association, and are rights belonging to all members of the public

The Association's reading of the 1985 Modification would eliminate with respect to Braddock Cove all contractual and property law connections the Declaration establishes between the land burdened and the land benefitted by assessments, except the Owners' obligation to pay dredging assessments.

Under the Association's reading, the "covenant" to pay dredging assessments is not a real covenant at all. It is an obligation imposed on dissenting property owners by the Association to pay to dredge property in which Owners have no devoted legal interest. An amendment that would eviscerate the rights of Owners in Common Properties established by the Declaration is unreasonable.

The problem is, as the court stated in *Armstrong v. Ledges Homeowners' Association,*[57]

> Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain.

The amendment at issue in the *Armstrong* case would have enlarged substantially the list of activities that homeowners could be assessed to support. The court held

[57] *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 87, 360 N.C. 547 (N.C. 2006), *cited with approval by Gates at Williams-Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 298, 792 S.E.2d 240, 249 (S.C. Ct. App. 2016).

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that an amendment that extended the association's assessment authority far beyond that contemplated by the original declaration was unreasonable and unenforceable, concluding, "every amendment must be *reasonable* in light of the contracting parties' original intent."[58]

Here, the original intent was to create a plan of real covenants under which South Beach property owners shared the responsibility to pay to maintain common properties in which they also shared ownership. The Association's interpretation of the 1985 Modification would eliminate the shared-ownership requirement, but extend the shared-obligation requirement by allowing the Association to force dissenting Owners to pay to support the property of a stranger. The 1985 Modification as interpreted by the Association would drastically change the original deal and is unreasonable and unenforceable. Indeed, the Declaration itself prohibits unreasonable amendments to its covenants. Article II, Sections 2(a) and (b) both state that a Supplementary Declaration adding property to the plan of the Declaration may modify covenants, but only "as are not inconsistent with the Plan of this Declaration."[59]

2. Indefinite

[58] *Id.*(emphasis in original).

[59] Exhibit 1, Art. II §§ 2(a)–(b).

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The second requirement for effectiveness of an amendment to a restrictive covenant stated by *Queen's Grant II* court is that the amendment must not be indefinite.

Affirmative covenants are unenforceable "unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application."[60] It is the duty of courts to interpret standards established by the parties, not to create standards for the parties.

The 1985 Modification purports to create categories of property: water, tideland, and submerged land, which are different from the category created by the Declaration—dry land. The 1985 Modification purported to amend the definition of "Common Properties" to include the Braddock Cove waterways and salt marsh open space areas. But it did not add anything to the assessment terms of the Declaration to state the Association's and its members rights and obligations with respect to the waterways. As interpreted by the Association, the 1985 Modification imposed no obligation to maintain Braddock Cove, but authorized the Association to assess dissenting Owners for any amount, allocated in any way it chose to help pay for maintenance dredging. The Association's argument, that the amendment of a *definition* (1) eliminated the requirement that "Common Properties" must be properties deeded to the Association, and (2) had the effect of authorizing the Association to levy assessments to maintenance dredge Braddock

[60] *Beech Mountain Prop. Owners' Ass'n v. Seifert*, 269 S.E.2d 178, 183, 48 N.C. App. 286, 294 (N.C. 1980).

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Cove at its option, for any amount, and on any basis approved by three quarters of a quorum of its members, eliminates the certainty and predictability of obligation inherent in the Declaration's original design. The "modified" Declaration fails to explain the Association's and its members' rights and obligations with respect to Braddock Cove and, consequently, its assessments for maintenance dredging are unenforceable. As the court stated in *Lovering v. Seabrook Island Property Owners' Association*,[61]

> In order to constitute an enforceable power of assessment in the Association, an assessment provision must: (1) express a sufficiently definite standard by which to measure liability for the assessment; (2) describe with particularity the property to be maintained; and (3) provide an ascertainable standard by which the purpose for which the assessment is levied can be objectively determined. . . . A standard such as "any other thing necessary or desirable in the opinion of the Board of Directors" is too vague to be enforceable.

The Association has no obligations to Owners or third parties with respect to Braddock Cove unless it chooses from time to time to assume them. The Association has no right to regulate the use of Braddock Cove unless it is granted rights by the State of South Carolina. The 1985 Modification gives no guidance as to obligations the Association may assume or the rights it may seek with respect to the Braddock Cove waterways.

And although the property of some Owners borders Braddock Cove, the property of many does not. The 1985 Modification provides no objective standard

[61] 344 S.E.2d 862, 866, 289 S.C. 77 (Ct. App. 1986), *aff'd as modified*, 352 S.E.2d 707, 352 S.E.2d 707, 291 S.C. 201 (1987).

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for allocating the burden of dredging assessments among Owners and, indeed, provides no objective standard for determining whether the Association will participate in maintenance dredging at all.

For example, in 2023, the Association's board decided not to participate the maintenance dredging of Braddock Cove for purely subjective reasons. As it said in its Fall 2022 Newsletter to Owners:

> This Board did not feel that residential members should be required to contribute the same percentages as the commercial members which obtain significantly greater financial benefit from the navigable waterway of Braddock Cove. While we certainly recognize that the dredge of Braddock Cove is a benefit to all of South Beach, and indeed to all of Sea Pines and the Town of Hilton Head, we felt that the residential members were being asked to pay a disproportionate amount, relative to the benefit received. As a result, Braddock Cove will largely be dredged but, as noted, the Upper Creek will not be included. . . .[62]

Decisions based on feelings are not decisions based on an ascertainable standard. As the court stated in *Beech Mountain Property Owners' Ass'n v. Seifert*,[63]

> Obviously, a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard.

The Court finds that the 1985 Modification is indefinite and unenforceable.

3. Public policy

[62] Exhibit 35, p. 4 (South Beach Newsletter, Fall 2022).

[63] 269 S.E.2d at 183.

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The third requirement for the effectiveness of an amendment of a restrictive covenant stated by the *Queen's Grant II* court is that it must not violate public policy.

a. Touch and concern

In the preamble to S.C. Code § 27-1-70, the statute that invalidated restrictive covenants that imposed transfer fees on the sale of real property, the South Carolina General Assembly affirmed the public policy of the State concerning restrictions on the transfer of property, stating:

> the public policy of this State favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the property . . . .[64]

The purported assessment obligation to dredge Braddock Cove does not touch and concern Owners' land because no legal interest in Braddock Cove—the property benefitted by the assessment—is attached to Owners' property. Burdens that do not touch and concern the burdened land are against the public policy of South Carolina.

b. Real covenant

To touch and concern the land, a covenant must be a real covenant. A real covenant by definition is an agreement between landowners respecting the use of their land, burdening the land of one, and benefitting the land of the other.[65] South

[64] S.C. Code § 27-1-70(B)(1).

[65] 5 *Powell on Real Property* ¶ 670.

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Carolina appellate cases dealing with real covenants have involved an exchange of promises between the owner of the land burdened by the promise and the owner of the land benefitted by the promise, or their predecessors in title.[66] In this case, the Declaration is built on real covenants.[67]

A real covenant may be enforced only by the owner of the dominant estate. As the court stated in *Stegall v. Housing Authority,*[68]

> One who seeks to enforce a restrictive covenant "must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder."

Here, there is no real covenant at all because there is no agreement between the Association as representative of the owners of the land burdened by the covenant, and the State of South Carolina, the owner of the land benefitted by the covenant. The State of South Carolina has no statutory, contractual, or property law right to require the Association to dredge Braddock Cove, and the Association has no obligation to the State to dredge Braddock Cove. The Association's obligation to dredge is not attached to the property benefitted by the dredging in any way.

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[66] *See, e.g., Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015) ("Restrictive covenants, sometimes referred to as 'real covenants,' are agreements to do, or refrain from doing, certain things with respect to real property.") (internal quotations omitted).

[67] Exhibit 1, Art. I § 1(c); Art. II §§ 1 & 2; Art. IV § 1; Art. V §§ 1 & 2; Art. VIII § 1.

[68] *Stegall v. Housing Authority of City of Charlotte*, 178 S.E.2d 824, 829, 278 N.C. 95 (N.C. 1971).

Instead, it is simply a contractual obligation to a dredging company that Association has sometimes assumed voluntarily.

Although packaged in the container of a property owners' association and clothed in the language of real covenants, the 1985 Modification as interpreted by the Association is nothing of the sort. Here, the Association is not acting as the owner of a dominant estate to enforce an assessment obligation against servient estates under a real covenant, but as a fundraiser to raise money to dredge Braddock Cove. It is using the coercive authority of a property owners' association, in the guise of enforcing a real covenant, to force dissenting Owners to contribute to a cause that three quarters of a quorum of the Association's members sometimes decide to support.

When a property owners' association ceases to use its assessment authority to support property in which it and its members have a common property interest, it ceases to be a property owners' association and becomes a fundraiser for a cause. The Association may not use assessment authority based on shared interests in property to coerce dissenting property owners to support its chosen cause.

Legally, paying dredging costs is a gratuitous act by the Association for the benefit of the land of a stranger. Under the Association's interpretation of the 1985 Modification, the coercive authority of the Association can be used not only to enforce real covenants, but also to force dissenting members to contribute to a cause supported by a super-majority of members simply because the dissenters happen to own property in the same development.

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c. Public property

The Braddock Cove waterways are public property. As the court stated in *McQueen v. South Carolina Coastal Council*,[69]

> Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State.

And the water itself is public property. Article XIV, Section 4 of the South Carolina Constitution states,

> All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed . . . .[70]

All members of the public are entitled to use and enjoy public waters. Members of the Association have no special rights to use Braddock Cove. The rights they have with respect to Braddock Cove are derived from the State of South Carolina, not the Association. The Association has no obligation to dredge Braddock Cove. Its occasional decisions to dredge are gratuitous. The Association is a private organization, established for the private purpose of managing private property for the benefit of private property owners. The Court finds that the 1985 Modification is against public policy, and unenforceable.[71]

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[69] *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116 (2003).

[70] S.C. Const. art. XIV § 4.

[71] In any event, as discussed above and in the briefing, even if the 1985 Modification were effective, it would not change the Declaration's requirement that "Common Properties" must be properties properly deeded to the Association, which did not occur here.

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II. The Association has no "Common Properties" and therefore has no authority to levy annual assessments.

South Carolina's Braddock Cove waterways, boat channels, and salt marsh open space areas are not "Common Properties for the reasons stated above. Further, the Association does not own any real property.[72] The Association's corporate power is limited by its certificate of incorporation to "improving, maintaining and operating the *common properties* of the association."[73] But the Association has no common properties to improve, maintain, or operate. Consequently, there is no authorized purpose for the annual assessments the Association imposes. Without common properties to manage, the Association's levy of annual assessments violates its certificate of incorporation and is *ultra vires.*

Consistent with the limitation on its corporate power contained in its certificate of incorporation, Article V, Section 2 of the Declaration expressly limits the authority of the Association to levy both annual and special assessments:[74]

> Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.

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[72] Stip. ¶ 18.

[73] Exhibit 4 (emphasis added).

[74] Exhibit 1, Art. V § 2.

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The Association owns no Common Properties**.** Annual assessments are currently used primarly to pay legal fees, insurance premiums, buy office supplies, and to fund the circular administrative process of collecting next year's annual assessments.[75]

With no Common Properties to manage, it is not possible for the Association to use annual assessments for the sole purpose for which they are authorized: to pay for the management of Common Properties. The Court finds that annual assessments without common properties to manage are *ultra vires* under the Association's certificate of incorporation and beyond its authority under Article V, Section 2 of the Declaration.[76]

III. Affirmative Defenses

The Association has submitted a number of affirmative defenses and other arguments. The Court has carefully considered each such defense, and finds them unavailing in the specific factual circumstances presented at trial. This includes each of the reasons discussed above and in Plaintiffs' legal briefs and arguments. In addition, the Court addresses certain points below.

A. Standing and statute of limitations

[75] Exhibit 34, Association financials.

[76] *See* S.C. Code § 33-31-304 (ultra vires acts); *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 605, 538 S.E.2d 15 (Ct. App. 2000) ("acts beyond the scope of the powers so granted are ultra vires. . . .").

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The Association argues that Plaintiffs have no standing to obtain relief because they acquired their property in South Beach after the 1985 Modification was filed and therefore "each Plaintiff took their property with full notice of the Covenants to which they were to be bound—of course, that is the purpose of covenants."[77]

The issue in this case is not simply whether the parties had notice of the Declaration's terms. The issue is about what the terms of the Declaration mean. The terms of the Association's governing documents as now recorded apply to future assessments that may be levied by the Association. The Association's alleged levy of past assessments under the incorrect notion that they were authorized does not change the meaning of the Declaration that is in effect today. As discussed at length at the trial, a challenge to recover past assessments arguably may be subject to the statute of limitations, but as long as Plaintiffs own property in South Beach they have standing to question the authority of the Association to levy and collect future assessments under the Association's governing documents as they exist today.

If the Association's theory of standing and statutes of limitation were correct, arguably no one who currently owns property in South Beach would be able to contest the authorization for any future assessment levied by the Association. Statutes of limitation begin to run when actions are taken under

[77] Mot. at p. 15. Of note, Mr. Trager acquired his property in 1983.

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documents, not simply when the documents were signed.[78] Plaintiffs have standing and their action for prospective declaratory and injunctive relief is not time barred.

B. Laches, equitable estoppel, and waiver

The Association asserts that Plaintiffs' alleged delay in bringing this case bars them from relief under the doctrines of laches, equitable estoppel, and waiver. The Declaration provides that delay does not estop or waive a party's right to enforce the Declaration. Article VII, Section 3, states,

> Failure by the Association or any Owner or the Company to enforce any covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce same thereafter.[79]

Non-waiver provisions are enforceable in South Carolina.[80]

In addition, the doctrines of laches, equitable estoppel, and waiver do not apply to the facts in this case as presented at trial. Waiver requires proof of the intentional relinquishment of a known right.[81] Here, there is no evidence that

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[78] *Cf. Poly-Med, Inc. v. Novus Scientific Pte. Ltd.*, 437 S.C. 343, 354, 878 S.E.2d 896, 902 (S.C. 2022) ("We acknowledge the obvious—an executory contract with continuing rights and obligations may result in separate breaches and give rise to separate causes of action for breach of contract subject to a new statute of limitations period.").

[79] Exhibit 1 at p. 14, art. VII, sec. 3.

[80] *Cf. Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (S.C. 1998) (stating that non-waiver clause was effective).

[81] "Waiver is the voluntary and intentional relinquishment of a known right. . . . Waiver, like estoppel, is an affirmative defense and the burden of proof is upon the party who asserts it." *Provident Life and Acc. Ins. Co. v. Driver*, 451 S.E.2d 924, 317 S.C. 471 (S.C. App. 1994) (internal citations omitted).

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Plaintiffs intended to relinquish their right to question the Association's right to levy future assessments.

Laches and equitable estoppel are equitable defenses that are available to a party that detrimentally changes its position based on unreasonable conduct of the other party and without knowledge of the underlying facts. Here, the Association now argues that it detrimentally relied on Plaintiffs' delay in bringing this action because Plaintiffs' delay supposedly induced the Association to continue to collect assessments under the mistaken belief that they were authorized. However, the Association has no legally recognized reliance interest that would allow it to continue collecting unauthorized assessments.[82] Moreover, Defendant's arguments do not apply to the claims for prospective relief.[83]

Alternatively, equitable defenses such as laches and equitable estoppel that require a showing of detrimental reliance are not available in cases involving the interpretation of an unambiguous contract. As the court stated in *Rodarte v. Univ. of S.C.*,[84]

> Indeed, an unambiguous, written contract is inherently incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable estoppel, a party must prove "lack of knowledge, and the means of knowledge, of the truth as to the facts in question." . . .

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[82] *Cf.* Ex. 12 at p. 8 ("Moreover, Plaintiffs made no showing of prejudice or reliance, nor that the Association intended to relinquish a known right. *See, e.g. Strickland v. Strickland*, 375 S.C. 76,650 S.E.2nd 465 (2007). That issue is also denied.")

[83] *See, e.g., Queen's Grant*, 628 S.E.2d at 902, 368 S.C. at 342 (finding developer had not shown that the defenses of laches and estoppel applied to claims against it for prospective relief).

[84] 799 S.E.2d 912, 419 S.C. 592 (S.C. 2017) (internal citations omitted)

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> However, an unambiguous contract is by definition capable of only one reasonable interpretation.

Detrimental reliance requires that the party asserting it had no knowledge of the true facts. Based on the presentations at trial, the Association's governing documents on these points are unambiguous and do not authorize the Association to collect assessments until it owns Common Properties. The Association is charged as a matter of law with knowledge of the meaning and the legal effect of its own governing documents.

C. Ratification

Ratification is an agency law doctrine that allows a principal with authority to act to approve the act of an agent who did not have authority.[85] In these specific factual circumstances as presented at trial, there is no principal-agent relationship between the Association and its members. The member vote purportedly approving the 1985 Modification would have been the act of the Association itself, not the act of an agent who needed the blessing of the principal. The Court agrees with the reasons stated in *Plaintiffs' Opposition to Defendants' Trial Brief*[86] that the purported vote did not authorize dredging assessments under the Association's governing documents and applicable South Carolina law. A vote by those without

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[85] *Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E. 2d 801, 803 (1989) ("[r]atification . . . means the express or implied adoption and confirmation by one person of any act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.") (emphasis added).

[86] *Plaintiffs' Opposition to Defendants' Trial Brief*, filed April 29, 2024, at pp. 21–23 ("Pl. Opp. Br.").

ROA 0067

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the necessary power cannot create authority where none existed in the first place. The Association cannot ratify one action by taking a different action pursuant to a purported amendment that was itself unauthorized.

D. Collateral estoppel and *res judicata*

The doctrines of collateral estoppel and *res judicata* prevent parties from re-litigating specific matters decided in a previous case. The Association asserts that Plaintiffs in this case are barred from relief because the claims they make here were decided against them in *Catwalk.* The Court finds that they were not. The defenses of collateral estoppel and *res judicata* require proof of the following elements:

1. The parties against whom the defenses are asserted must have been parties to the previous case.[87]

Here, Plaintiffs Stroup and Trager were not parties in *Catwalk.*

2. The previous case must have decided the same issue (collateral estoppel) or the same claim (*res judicata*) that is involved in the current case.

Catwalk decided a central substantive issue and a central substantive claim: that the terms of another contract, a 1970 declaration of covenants applicable to commercial properties in South Beach, did not exempt the *Catwalk* plaintiffs from the Declaration at issue in this case.[88] This case does not involve the document at issue in *Catwalk.* Instead, this case involves the interpretation of the Declaration and the 1985 Modification. *Catwalk* did not consider or determine whether the

[87] *Ex parte Allstate Ins. Co.*, 339 S.C. 202, 206–207, 528 S.E.2d 679 (Ct. App. 2000).

[88] Ex. 27, *Catwalk* order.

ROA 0068

Association owns any "Common Properties" and did not consider or determine whether the Association has authority to collect dredging assessments.

CONCLUSION

After careful consideration, based on the specific factual context presented at trial, the Court denies Defendant's motion and finds: (1) the Association may not legally assess Plaintiffs for dredging Braddock Cove's boat channels and waterways, and enjoining the Association from levying assessments for this purpose; and (2) the Association may not levy annual assessments on Plaintiffs until such time as it owns Common Properties, and enjoining the Association from levying annual assessments on them until such time as it owns Common Properties. The Association's counterclaims are denied and dismissed for the same reasons.

It is so ordered.

Robert J. Bonds
Circuit Court Judge

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Beaufort Common Pleas

Case Caption: Stanley S Stroup , plaintiff, et al VS Sea Pines South Beach Owners Association Inc

Case Number: 2021CP0701655

Type: Order/Judgment Amended and Form 4

So Ordered

s/ Robert Bonds, 2770

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, *each both individually and derivatively*, Plaintiffs, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT **SUMMONS**

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herewith served upon you and to serve a copy of your Answer to the said Complaint on Plaintiffs' undersigned attorney at the address below, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer said Complaint within the time aforesaid, the Plaintiffs will apply to the Court for the relief demanded in the said Complaint.

Respectfully submitted,

FORD WALLACE THOMSON LLC

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September 13, 2021

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, *each both individually and derivatively*, Plaintiffs, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT **VERIFIED COMPLAINT** **Declaratory Judgment** **Non-Jury**

Plaintiffs Stanley Stroup as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, Peter Trager, and Vacation Inn, LLC, by and through the undersigned attorneys, submit this Complaint and allege as set forth below, both individually and derivatively:

PARTIES

1. Plaintiff Stanley Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003 ("Stroup") is an individual who resides in and is a citizen of South Carolina. Stroup is the owner of certain real property, located at 253 South Sea Pines Drive, Hilton Head Island, SC 29928, within the Sea Pines South Beach development.
2. Plaintiff Peter Trager ("Trager") is an individual who resides in and is a citizen

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of Georgia. Trager is an owner of certain real property, located at 247 South Sea Pines Drive, Hilton Head Island, SC 29928, within the Sea Pines South Beach development.

3. Plaintiff Vacation Inn, LLC ("Vacation Inn") is a South Carolina limited liability corporation that owns certain real property located at 3 Braddock Bluff Drive, Hilton Head Island, SC 29928, within the Sea Pines South Beach development.
4. Defendant Sea Pines South Beach Owners' Association, Inc. (the "Association") is a non-profit corporation organized under the laws of the State of South Carolina, with its principal place of business in Hilton Head Island, South Carolina.

JURISDICTION AND VENUE

5. This Court has subject-matter jurisdiction over the claims in this lawsuit under article V § 11 of the South Carolina Constitution and, *inter alia*, South Carolina Code §§ 14-5-350 *et seq*. and 15-7-10 *et seq*.
6. This Court has personal jurisdiction over the parties because they own property and/or have their principal place of business in Beaufort County.
7. Venue is proper in this circuit under, *inter alia*, South Carolina Code § 15-7-30 *et seq*. because the Association resides in this division, the property at issue is located in this division, and a substantial part of the events or omissions giving rise to this claim occurred or will occur in this division

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FACTS

8. This lawsuit challenges improper assessments being levied by the Association against Plaintiffs and the Association's other members.
9. The Association is a property owners' association formed in 1970 for the sole purpose of managing common properties, if any, in the South Beach development in Sea Pines Plantation, Hilton Head Island, South Carolina.
10. The Association's certificate of incorporation states that its sole purpose is "improving, maintaining and operating the common properties of the association for the benefit, health, welfare and recreation of the members of the association."
11. A true and correct copy of the Association's Certificate of Incorporation is attached to this Complaint as Exhibit "A."
12. The original rights and obligations of the Association and its members are contained in the "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina and Provisions for the Sea Pines South Beach Owners' Association, Inc., " dated June 25, 1970 and filed with the Office of the Clerk of Court for Beaufort County, South Carolina (the "Original Declaration"). The Association may amend the covenants of the Original Declaration subject to satisfaction of specified conditions. (Art. VIII, Sec. 1).
13. A true and correct copy of the Original Declaration is attached to this Complaint as Exhibit "B."

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14. Plaintiffs are owners of residential property in the South Beach development, and they are members of the Association by virtue of their ownership of that property (*see* Ex. B, Art. III, Sec. 1).

15. The Original Declaration defines an "Owner" as "the record owner . . . of the fee simple title to any Lot or Dwelling Unit" within the property bound by the declaration. (Ex. B, Art. I, Sec. 1(g)).

16. The Original Declaration is enforceable by "any Owner," such as the Plaintiffs. (Ex. B, Art. VIII, Sec. 1).

17. The Original Declaration authorizes the Association to levy Annual and Special Assessments on Owners to be "used exclusively for the improvement, maintenance, and operation of the Common Properties…." (Ex. B, Art. V, Sec. 2).

18. The Original Declaration also authorizes the Association to levy Special Assessments, with the approval of three-fourths of the Owners at a duly called meeting, for the limited purpose of constructing, repairing, or replacing capital improvements on the Common Properties. (Ex. B, Art. V, Sec. 4).

19. The Original Declaration defines "Common Properties":

> Common Properties shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties". . . All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties, (subject to the fee schedules and operating rules adopted by the Association).

(Ex. B, Art. I, Sec. 1(c)).

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20. In 1985, the Association filed a "Modification of Covenants" purporting to amend the definition of Common Properties in the Original Declaration "to include all boat channels, waterways, channel markers and sea marsh open areas of Braddock Cove" (the "1985 Modification").
21. A true and correct copy of the 1985 Modification is attached to this Complaint as Exhibit "C."
22. At the time the Association made the 1985 Modification, the Association owned no Common Properties.
23. Because the Association owned no Common Properties, it had no authority to modify covenants of the Original Declaration.
24. In making the 1985 Modification, the Association failed to adhere to the Original Declaration's requirements for amendment and for subjecting additional property to the Original Declaration.
25. The 1985 Modification refers to a quitclaim deed purporting to convey to the Association the grantor's interest (if any) in the Braddock Cove waterways (the "Quitclaim Deed").
26. A true and correct copy of the Quitclaim Deed is attached to this Complaint as Exhibit "D".
27. The Braddock Cove waterways described in the 1985 Modification and Quitclaim Deed are tidal waters owned by the State of South Carolina in public trust. Consequently, the grantor had no interest in them whatsoever and the Quitclaim Deed conveyed nothing.

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28. The 1985 Modification, even if it validly modified the Original Declaration, did not alter the Original Declaration's requirements that "Common Properties" must be, *inter alia*, land deeded to the Association and "devoted to and intended for the common use and enjoyment" of property owners within South Beach. (Ex. B, Art. I, Sec. 1(c)).
29. The Association admits that it has no ownership interest in the Braddock Cove waterways, and it has acknowledged to its members that "the State of South Carolina owns these waterways, now and for the last hundreds of years." *See* pages 2 and 3 of the Association's newsletter to members for December 2020, attached to this Complaint as Exhibit "E".
30. Exhibit E is a true and correct copy of a public statement by the Association to its members.
31. The Association owns no Common Properties.
32. The Association has levied Annual Assessments on Owners since its inception and contends that it has the authority to levy Annual Assessments in the future.
33. The Association levied Special Assessments on Owners in the past for maintenance dredging of the Braddock Cove waterways, including without limitation in 1999, 2013, and 2018.
34. The Association contends that it has the authority to levy Special Assessments for maintenance dredging of the Braddock Cove waterways in the future, and to levy such assessments against its members, including the Plaintiffs, and their property. (*See* Ex. E).

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35. The Association has no authority to levy Annual Assessments or Special Assessments because it owns no Common Properties.

36. Assessment for maintenance of the public waterways is against public policy, outside the scope of the Association's authority, *ultra vires*, in violation of its governing documents, and contrary to the property rights and obligations of its members.

37. The Association is a member of The South Island Dredging Association ("SIDA"), a purpose of which is to dredge the public waterway. The Association's membership in SIDA is outside the scope of the Association's authority, *ultra vires*, and contrary to the Association's governing documents.

38. Each of the exhibits attached to this Complaint is incorporated herein as if set forth fully.

DERIVATIVE STANDING

39. At all times relevant to the subject matter of this lawsuit, Plaintiffs were, and are today, members of the Association.

40. This derivative action is not a collusive one to confer jurisdiction that the Court would otherwise lack.

41. Plaintiffs have demanded, without success, that the board of directors of the Association stop and refrain from the unlawful actions alleged herein, including but not limited to by letters dated May 21, 2021 and July 23, 2021, attached hereto as "Exhibit F".

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42. The directors of the Association have failed to comply with the demands.

43. The complained-of actions by the Association are not authorized by South Carolina law or by properly-amended governing documents, and therefore are *ultra vires*, unlawful, unauthorized, and incapable of ratification. Accordingly, the actions complained of herein are not protected by the business judgment rule, and any reasonable, good faith inquiry into this wrongdoing would conclude that Plaintiffs' claims should be pursued and are in the best interests of the Association and its members.

44. The actions complained of herein have been and will continue to be to the detriment of the Association and its members.

45. Plaintiffs fairly and adequately represent similarly situated members of the Association, because all lot-owning members have an interest in the property rights and obligations at issue in this action, as well as in the power of the Association to assess them, and the manner in which the Association may use such assessment funds.

FIRST CAUSE OF ACTION
(Breach of Covenants in the Nature of Contract)
(Declaratory Judgment)

46. The allegations above and below are incorporated into this cause of action as if set forth fully herein.

47. This claim is brought pursuant to the South Carolina Declaratory Judgment Act, S.C. Code § 15-53-10 *et seq.* and other applicable law.

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48. A valid and enforceable contract exists between the parties in the form of the governing documents of the Association, including its declarations, covenants, and restrictions.

49. The Association has breached the contract by, *inter alia*, levying both Annual and Special Assessments on the Plaintiffs and their real property and by continuing to accrue interest on the Plaintiffs for nonpayment of such invalid assessments.

50. Each Plaintiff has not paid one or more Annual Assessments levied by the Association. As a result, the Association has imposed a lien on Plaintiffs' properties and has accrued and continues to accrue interest on Plaintiffs' purported Assessment obligations at the annual rate of 8%. (Ex. B, Art. V, Sec. 9).

51. The levy of invalid assessments by the Association has damaged the Plaintiffs and will continue to damage them.

52. Plaintiffs request that the Court enter a judgment declaring that:

    52.1. The Braddock Cove waterways are not "common properties of the association" and that assessments to support them are *ultra vires* and unenforceable.

    52.2. The 1985 Modification was not adopted in accordance with the requirements of the Original Declaration and South Carolina law, is against public policy and is therefore invalid and unenforceable.

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52.3. The levy of Special Assessments for the maintenance dredging of the Braddock Cove waterways is not authorized by the Original Declaration nor any amendment thereto effected by the 1985 Modification.

52.4. If the 1985 Modification was valid, it did not modify the requirements in the Original Declaration pertaining to Common Properties, including that they must be properties owned by the Association, devoted to the use of its members, intended for the common use of its members, and in which members of the Association have an appurtenant easement of enjoyment running with title to their Lots and Dwelling Units.

52.5. The Braddock Cove waterways are not owned by the Association and are not Common Properties as defined by the Original Declaration or any valid modification thereto, nor are they "common properties" as the term "common properties" is used in the Certificate of Incorporation.

52.6. Alternatively, if the Original Declaration and the purported 1985 Modification are interpreted to authorize Special Assessments to support property in which the Association has no property interest, such assessments violate public policy and are unenforceable.

52.7. Alternatively, if the Original Declaration and the purported 1985 Modification are interpreted to authorize the Association to impose Assessments to support property in which the Association has no property interest, any purported obligation to pay assessments to dredge the Braddock Cove waterways is personal and does not run with the land.

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52.8. Special Assessments may be levied only to pay capital expenses, not to pay maintenance expenses. The dredging of the Braddock Cove waterways paid for by the Special Assessments is maintenance dredging and is not authorized by the Original Declaration nor any amendment thereto effected by the 1985 Modification.

52.9. The Association lacks authority to levy Annual Assessments under the Original Declaration because the Association presently owns no Common Properties.

52.10. Until such time as the Association owns Common Properties, Annual Assessments levied by the Association may not exceed amounts necessary to maintain the Association's status as a corporation in good standing under South Carolina law.

52.11. The Association's membership in SIDA is beyond the scope of its charter and is *ultra vires*.

SECOND CAUSE OF ACTION
(*Ultra Vires* Action)
(Injunction and Declaratory Relief)

53. The allegations above and below are incorporated into this cause of action as if set forth fully herein.

54. The Association's actions described above are *ultra vires*, including without limitation under S.C. Code § 33-31-304 *et seq.* and other applicable law.

55. Plaintiffs accordingly request that the Court enter an order enjoining the Association from the actions specified above (including in ¶ 52 and all sub-

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paragraphs, *supra*) pursuant to South Carolina Rule of Civil Procedure 65 and other applicable law, and declaring that such actions are prohibited and unlawful under S.C. Code § 15-53-10 *et seq.* and other applicable law.

WHEREFORE, Plaintiffs request that judgment be entered against Defendant on all causes of action, and that Plaintiffs be awarded:

A. A declaratory judgment as set forth above;

B. Injunctive relief as set forth above;

C. Attorneys' fees and costs; and

D. Such other and further relief allowed by law and that the Court deems just and appropriate.

Respectfully submitted,

FORD WALLACE THOMSON LLC

By: /s Ian Ford
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Attorneys for Plaintiffs

Charleston, South Carolina

September 13, 2021

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
STANLEY S. STROUP both individually and as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, *each both individually and derivatively,* Plaintiffs, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant.	**VERIFICATION**

I, ROBERT GOSSETT, managing member of Plaintiff Vacation Inn, LLC, being duly sworn, say that Vacation Inn, LLC is a Plaintiff herein, and I have read the foregoing Complaint and know the contents thereof for purposes of this lawsuit, that the same is true to the best of my and Vacation Inn, LLC's knowledge, except as matters therein stated to be alleged on information and belief, and to those matters I and Vacation Inn, LLC believe to be true.

Robert Gossett, managing member of Vacation Inn, LLC

Sworn to and subscribed to before me this 13th day of September 2021.

Notary Public for South Carolina
My Commission expires: 3/19/22

JOHANNA ARMS
NOTARY PUBLIC
SOUTH CAROLINA

The R. L. Bryan Company, Columbia, S. C.

8496

Exhibit
Sea Pines South Beach
A

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The State of South Carolina | CERTIFICATE OF INCORPORATION

EXECUTIVE DEPARTMENT | BY THE SECRETARY OF STATE

WHEREAS, Dennie L. McCrary and Harold Depkin
of
Sea Pines Plantation, Hilton Head Island, South Carolina
Lawton Jordan, Jr., Milledge Road, Augusta Georgia

two or more of the officers or agents appointed to supervise or manage the affairs of

SOUTH BEACH HOMEOWNERS' ASSOCIATION, INC.

which has been duly and regularly organized, did on the 2nd day of October, A. D. 1969, file with the Secretary of State a written declaration setting forth:

That, at a meeting of the aforesaid organization held pursuant to the by-laws or regulations of the said organization, they were authorized and directed to apply for incorporation.

That, the said organization holds, or desires to hold, property in common for Religious, Educational, Social, Fraternal, Charitable or other eleemosynary purpose, or any two or more of said purposes, and is not organized for the purpose of profit or gain to the members, otherwise than is above stated, nor for the insurance of life, health, accident or property; and that three days' notice in the Beaufort Gazette, a newspaper published in the County of Beaufort, has been given that the aforesaid Declaration would be filed.

AND WHEREAS, *Said Declarants and Petitioners* further declared and affirmed:

FIRST: Their names and residences are as above given.

SECOND: The name of the proposed Corporation is SOUTH BEACH HOMEOWNERS' ASSOCIATION, INC.

THIRD: The place at which it proposes to have its headquarters or be located is Sea Pines Plantation, Hilton Head Island, S. C.

FOURTH: The purpose of the said proposed Corporation is improving, maintaining and operating the common properties of the association for the benefit of the health, welfare and recreation of the members of the association.

FIFTH: The names and residences of all Managers, Trustees, Directors or other officers are as follows:

Dennie L. McCrary	Sea Pines Plantation	Director
Harold Depkin	Sea Pines Plantation	Director

SIXTH: That they desire to be incorporated: in perpetuity

NOW, THEREFORE, I, O. FRANK THORNTON, Secretary of State, by virtue of the authority in me vested, by Chapter 12, Title 12, Code of 1962, and Acts amendatory thereto, do hereby declare the said organization to be a body politic and corporate, with all the rights, powers, privileges and immunities, and subject to all the limitations and liabilities, conferred by said Chapter 12, Title 12, Code of 1962, and Acts amendatory thereto.

GIVEN under my hand and the seal of the State, at Columbia, this 2nd day of October, in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 94th year of the Independence of the United States of America.

O. FRANK THORNTON,
Secretary of State.

Amended Restrictions 132/260

Exhibit
Sea Pines South Beach
B

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PART I
DECLARATION OF COVENANTS AND RESTRICTIONS FOR
SEA PINES SOUTH BEACH, HILTON HEAD ISLAND, SOUTH CAROLINA
AND
PROVISIONS FOR THE SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.

THIS DECLARATION, made this 25th day of June, A. D., 1970, by LIGHTHOUSE BEACH COMPANY, a South Carolina Limited Partnership with its principal place of business at Hilton Head, South Carolina, hereinafter called Company.

WITNESSETH:

WHEREAS, Company is the owner of the real property described in Article II of this declaration and desires to create thereon a planned unit development community known as South Beach with permanant parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhouse areas, and other Common Properties for the benefit of the said community; and

WHEREAS, Company desires to provide for the preservation of the values and amenities in said community and for the maintenance of said parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhouse areas, and other Common Properties; and, to this end, desires to subject the real property described in Article II, together with such additions as may hereafter be made, as provided in Article II, to the covenants, restrictions, easements, affirmative obligations, charges, and liens, hereinafter set forth, each and all of which is and are hereby declared to be for the benefit of said property and each and every owner of any and all parts thereof; and

WHEREAS, Company has deemed it desirable, for the efficient preservation of the values and amenities in said community, to create an agency to which should be delegated and assigned the power and authority of maintaining and administering the Common Properties and administering and enforcing the covenants and restrictions governing the same and collecting and disbursing all assessments and charges necessary for such maintenance, administration and enforcement, as hereinafter created; and

WHEREAS, Company has caused to be incorporated under the laws of the State of South Carolina, as a non-profit corporation, SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., for the purpose of exercising the functions aforesaid, and which are hereinafter more fully set forth.

NOW, THEREFORE, the Company declares that the real property described in Article II, and such additions thereto as may hereafter be made pursuant to Article II hereof, is and shall be held, transferred, sold, conveyed, leased, occupied, and used subject to the covenants, restrictions, conditions, easements, charges, assessments, affirmative obligations, and liens (sometimes referred to as "the covenants") hereinafter set forth.

ARTICLE I
DEFINITIONS

Section 1. The following words and terms, when used in this Declaration, or any Supplemental Declaration (unless the context clearly shall indicate otherwise) shall have the following meanings:

(a) "Association" shall mean and refer to the Sea Pines South Beach Owners' Association, Inc., a South Carolina non-profit corporation.

Owners' Association, Inc., a South Carolina non-profit corporation.

(b) The "Properties" shall mean and refer to the Existing Property described in Article II hereof, and additions thereto, as are subject to this Declaration or any Supplemental Declaration under the provisions of Article II hereof.

(c) "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties". The term "Common Properties" shall include any personal property acquired by the Association if said property is designated as "Common Property". All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties, subject to the fee schedules and operating rules adopted by the Association.

(d) "Lot" shall mean and refer to any improved or unimproved plat of land shown upon any recorded final subdivision map of any part of the Properties with the exception of Common Properties as heretofore defined.

(e) "Dwelling Unit" shall mean and refer to any portion of any building situated upon the Properties designed and intended for use and occupancy by a single family. "Dwelling Unit" shall include, without limiting the term, each apartment in any Multi-family structure, each town house (when two or more are located on a single lot), and each unit in a residential condominium.

(f) "Multi-family Structure" shall mean and refer to any building containing two or more Dwelling Units under one roof except when each Dwelling Unit is situated upon its own individual lot.

(g) "Owner" shall mean and refer to the record owner, whether one or more persons, firms, associations, corporations or other legal entities, of the fee simple title to any Lot or Dwelling Unit situated upon the Properties but, notwithstanding any applicable theory of a mortgage, shall not mean or refer to the mortgagee unless and until such mortgagee has acquired title pursuant to foreclosure proceedings or any proceeding in lieu of foreclosure; nor shall the term "owner" mean or refer to any lessee or tenant of an Owner.

(h) "Member" shall mean and refer to all those Owners who are Members of the Association as provided in Section 1 of Article III hereof.

(i) "Company" shall mean the Lighthouse Beach Company and its successors and assigns.

ARTICLE II

Section 1. Existing Property. The real property which is, and shall be held, transferred, sold, conveyed, leased and occupied, subject to these covenants, is located on Hilton Head Island, Beaufort County, South Carolina, and is more particularly described in Exhibit A hereto attached and by reference incorporated herein. All of the real property hereinabove described shall hereinafter be referred to as "Existing Property". The Company intends to develop the Existing Property in accordance with its Master Plan dated March 15, 1970. However, the Company reserves the right to review and modify the Master Plan from time to time based on its continuing research and design program.

Unless otherwise stated therein, the Master Plan shall not bind the Company, its successors and assigns to adhere to, the Master Plan in the development of the land shown thereon. Subject to its right to modify the Master

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development of the land shown thereon. Subject to its right to modify the Master Plan as stated herein, the Company will convey the common Properties shown on the Master Plan to the Association as provided in Article IV, Section 2. It also shall be understood that the Company shall be free to develop such portions or sections of the lands depicted in the Master Plan, as, in the reasonable exercise of its discretion, it deems in the best interest of the entire development, without regard to the relative location of such portions or sections within the overall plan; that it shall not be required to follow any predetermined sequence or order of improvements and development; and that it may bring within the plan of these covenants additional lands, and develop the same before completing the development of the existing property.

Section 2. Additions to Existing Property. Additional lands may become subject to this Declaration in the following manner:

(a) Additions. The Company, its successors, and assigns, shall have the right, without further consent of the Association, to bring within the plan and operation of this Declaration, additional properties in future stages of the development.

The additions authorized under this and the succeeding sub-section, shall be made by filing of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.

The Supplementary Declaration may contain such complementary additions and modifications of the covenants and restrictions contained in this Declaration as may be necessary or convenient, in the judgment of the Company, to reflect the different character, if any, of the added properties and as are not inconsistent with the Plan of this Declaration.

(b) Other Additions. Upon approval in writing of the Association pursuant to three-fourths of the vote at a duly called meeting, the owner of any property other than the Company who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.

The Supplementary Declaration may contain such complementary additions and modifications of the covenants and restrictions contained in this

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Declaration as may be necessary or convenient, in the judgment of the Company, to reflect the different character, if any, of the added properties and as are not inconsistent with the Plan of this Declaration.

(c) Mergers. Upon a merger or consolidation of the Association with another association as provided for in the By-Laws of The Association, its properties, rights and obligations may, by operation of law, be transferred to another surviving or consolidated association, or, in the alternative, the properties, rights and obligations of another association may, by operation of law, be added to the properties of the Association as a surviving corporation pursuant to a merger. The surviving or consolidated association may administer the covenants and restrictions established by this Declaration within the Existing Property, together with the covenants and restrictions established upon any other properties as one plan. No such merger or consolidation, however, shall effect any revocation, change of or addition to the Covenants established by this Declaration within the Existing Property as herein provided.

ARTICLE III
MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION

Section 1. Membership. The Company and every person or entity who is a record owner of a fee simple or undivided fee simple interest in any Lot or Dwelling Unit which is subject by the Covenants to assessment by the Association shall be a member of the Association, provided that any such person or entity who holds such title or interest merely as a security for the performance of an obligation shall not be a member of the Association.

Section 2. Voting Rights. The Association shall have two (2) classes of voting membership:

CLASS "A" — Class A Members shall be all those owners as defined in Section One (1) with the exception of the Company. Class "A" Members shall be entitled to one vote for each Lot and Dwelling Unit in which they hold the interest required for membership by Section One (1). When more than one person holds such interest or interests in any Lot or Dwelling Unit all such persons shall be members, and the vote for such lot or dwelling unit shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any such Lot or Dwelling Unit. A Member casting a vote representing a Dwelling Unit owned by such Member shall not be entitled to cast an additional vote for the Lot upon which said Dwelling Unit is situated. In the event a single Dwelling Unit is sold in fee with a Lot, the vote with respect thereto shall thereafter be cast on the basis of the Dwelling Unit only. When one or more co-owners sign a proxy or purports to vote for his or her co-owners, such vote shall be counted unless one or more of the other co-owners is present and objects to such vote, or if not present, submits a proxy or objects in a writing delivered to the Secretary of the Association before the vote is counted. If co-owners disagree as to the vote, the vote shall be split equally among the co-owners.

CLASS "B" — The Class B Member shall be the Company. The Class B Member shall be entitled to one vote plus one vote for each vote held by a Class A Member. One vote of the Class A Membership shall be equivalent to one vote of Class B Membership. The total vote of the Association shall consist of the sum of the votes of Class A Members and of the votes of Class B Members.

ARTICLE IV
PROPERTY RIGHTS IN THE COMMON PROPERTIES

Section 1. Member's Easements of Enjoyment. Subject to the provisions of these covenants and the rules and regulations of the Association, every Member shall have a right and easement of enjoyment in and to the Common Properties and

shall have a right and easement of enjoyment in and to the Common Properties and such easement shall be appurtenant to and shall pass with the title of every Lot or Dwelling Unit.

Section 2. Title to Common Properties. The Company may retain the legal title to the Common Properties until such time as it has completed improvements thereon and until such time as, in the opinion of the Company, the Association is able to maintain the same, but notwithstanding any provision herein, the Company hereby covenants, for itself, its successors and assigns that it shall convey the Common Properties to the Association within one hundred and eighty (180) days of the time they are completed. Said Common Properties may be conveyed subject to all restrictive covenants of record.

Section 3. Extent of Member's Easements. The rights and easements of enjoyment created hereby shall be subject to the following:

(a) The right of the Company and of the Association, in accordance with its By-Laws, to borrow money for the purpose of improving the Common Properties and in aid thereof to mortgage said properties.

(b) The right of the Association to take such steps as are reasonably necessary to protect the above described properties against foreclosures; and

(c) The right of the Association, as provided in its By-Laws, to suspend the enjoyment of rights of any member for any period during which any assessment remains unpaid, and for any period not to exceed thirty (30) days for any infraction of its published rules and regulations, it being understood that any suspension for either non-payment or any assessment or a breach of the rules and regulations of the Association shall not constitute a waiver or discharge of the Member's obligation to pay the assessment; and

(d) The right of the Association to charge reasonable admission and other fees for the use of the Common Properties and/or facilities therein; and

(e) The right of the Company to dedicate or transfer to any public or private utility, utility easements on any part of the Common Properties.

(f) The right of the Association to give or sell all or any part of the Common Properties including leasehold interest to any public agency, authority, or utility or private concern for such purposes and subject to such conditions as may be agreed to by the Members, provided that no such gift or sale or determination as to the purposes or as to the conditions thereof, shall be effective unless such dedications, transfer and determination as to purpose and conditions shall be authorized by the vote of three-fourths (3/4) of the vote at a duly called meeting and unless written notice of the proposed agreement and action thereunder is sent to every Member at least thirty (30) days in advance of any action taken. A true copy of such resolution together with a certificate of the result of the vote taken thereon shall be made and acknowledged by the President or Vice-President and Secretary or Assistant Secretary of the Association and such certificate shall be

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annexed to any instrument of dedication or transfer affecting the Common Properties, prior to the recording thereof. Such certificate shall be conclusive evidence of authorization by the membership.

ARTICLE V
COVENANT FOR MAINTENANCE ASSESSMENTS

Section 1. Creation of the Lien and Personal Obligation of Assessments. The Company for each Lot and Dwelling Unit owned by it within The Properties hereby covenants and each Owner of any Lot or Dwelling Unit shall by acceptance of a deed therefor, whether or not it shall be so expressed in any such deed or other conveyance, be deemed to covenant and agree to all the terms and provisions of these covenants and to pay to the Association: (1) Annual assessments or charges; (2) Special Assessments for the purposes set forth in Section 4 of this Article, such assessments to be fixed, established and collected from time to time as hereinafter provided. The Annual and Special assessments together with such interest thereon and costs of collection therefor as hereinafter provided, shall be a charge and continuing lien on the land and all the improvements thereon against which each such assessment is made. Each such assessment, together with such interest thereon and cost of collection thereof as hereinafter provided, shall also be the personal obligation of the person who was the owner of such property at the time when the assessment fell due. In the case of co-ownership of a Lot or Dwelling Unit, all of such co-owners of the Lot or Dwelling Unit shall be jointly and severally liable for the entire amount of the assessment.

Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.

The Special Assessments shall be used for the purposes set forth in Section 4 of this Article.

Section 3. Basis and Maximum of Annual Assessments. Until the year beginning January 1, 1973, the annual assessments shall not be more than five and no/100 ($5.00) dollars per month per Lot or Dwelling Unit unless a higher annual assessment is approved by three-fourths (3/4) of the vote at the annual meeting. The owner of one or more Dwelling Units who also owns the Lot upon which said one or more Dwelling Units are located shall pay one assessment for each Dwelling Unit but shall not be assessed for the Lot upon which the Dwelling Units are located. From and after January 1, 1973, the annual assessment may be increased each year by five percent (5%) of the maximum authorized assessment for the preceding year unless three-fourths (3/4) of the vote at the annual meeting votes against said increase or votes to increase said annual assessment by a greater amount or to decrease the annual assessment.

The Board of Directors of the Association may, after consideration of current maintenance costs and future needs of the Association, fix the annual assessment for any year at a lesser amount, but such action shall not constitute a waiver by the Association of its right to revert to the full assessment for the remaining

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year or years of the then current period fixed as provided in the preceding paragraph.

Section 4. Special Assessments for Improvements and Additions. In addition to the annual assessments authorized by Section 3 hereof, the Association may levy special assessments; for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, unexpected repair or replacement of a described capital improvement upon the Common Properties, including the necessary fixtures and personal property related thereto or addition to the Common Properties, provided that any such assessment shall have the assent of three-fourths (3/4) of the vote at a duly called meeting, written notice of which shall be sent to all Members at least thirty (30) days in advance and shall set forth the purpose of the meeting.

Section 5. Change in Basis and Maximum of Annual Assessments Upon Merger of Consolidation. The limitations of Section 3 hereof shall not apply to any change in the maximum and basis of the assessments undertaken as an incident to a merger or consolidation in which the Association is authorized to participate under Article 2, Section 2, hereof, and under the By-Laws of the Association.

Section 6. Quorum for any Action Authorized. The presence at the meeting of Members or of proxies, entitled to cast sixty (60%) percent of the total vote of the membership shall constitute a quorum. If the required quorum is not forthcoming at a meeting, another meeting may be called, subject to the notice requirement set forth in Section 4.

Section 7. Date of Commencement of Annual Assessments. Due Dates. The annual assessments provided for herein shall commence on the date (which shall be the first day of a month) fixed by the Board of Directors of the Association to be the date of commencement.

The first annual assessments shall be made for the balance of the calendar year and shall become due and payable on the day fixed for commencement. The assessments for any year, after the first year, shall become due and payable the first day of January of said year.

The amount of the annual assessment which may be levied for the balance remaining in the first year of assessment shall be an amount which bears the same relationship to the annual assessment provided for in Section 3 hereof, as the remaining number of months in that year bear to twelve. The same reduction in the amount of the assessment shall apply to the first assessment levied against any property which is hereafter added to the properties now subject to assessment at a time other than the beginning of any assessment period.

The due date of any special assessment under Section 4 hereof shall be fixed in the resolution authorizing such assessment.

Section 8. Duties of the Board of Directors. The Board of Directors of the Association shall fix the date of commencement and the amount of the assessment against such Lot or Dwelling Unit for each assessment period and shall, at that time, prepare a roster of the properties and assessments applicable thereto which shall be kept in the office of the Association and shall be open to inspection by any Owner.

Written notice of the assessment shall thereupon be sent to every Owner subject thereto.

The Association shall upon demand at any time furnish to any Owner liable

The Association shall upon demand at any time furnish to any Owner liable for said assessment a certificate in writing signed by an officer of the Association, setting forth whether said assessment has been paid. Such certificate shall be conclusive evidence of payment of any assessment therein stated to have been paid.

Section 9. Effect of Non-Payment of Assessment. The personal obligation

of the Owner; The Lien; Remedies of Association. If the assessments are not paid on the date when due (being the dates specified in Section 7 hereof), then such assessment shall become delinquent and shall, together with such interest thereon at the rate of eight (8%) percent per annum from the due date and cost of collection thereof as hereinafter provided, thereupon become a charge and continuing lien on the land and all improvements thereon, against which each such assessment is made, in the hands of the then Owner, his heirs, devisees, personal representatives and assigns. The personal obligation of the Owner at the time of the assessment to pay such assessment, however, shall remain his personal obligation for the statutory period and shall not pass as a personal obligation to his successors in title unless expressly assumed by them.

If the assessment is not paid within thirty (30) days after the due date, the Association may bring an action at law against the Owner personally obligated to pay the same or to foreclose the lien against the property, and there shall be added to the amount of such assessment the costs of preparing and filing the complaint in such action, and in the event a judgment is obtained, such judgment shall include interest on the assessment as above provided and a reasonable attorney's fee to be fixed by the court together with the costs of the action.

Section 10. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any mortgage or mortgages now or hereafter placed upon the properties subject to assessment; provided, however, that such subordination shall apply only to the assessments which have become due and payable prior to a sale or transfer of such property pursuant to a decree of foreclosure, or any other proceeding in lieu of foreclosure. Such sale or transfer shall not relieve such property from liability for any assessments thereafter becoming due, nor from the lien of any such subsequent assessment.

Section 11. Exempt Property. The following property, individuals, partnerships or corporations, subject to this Declaration shall be exempted from the assessment, charge and lien created herein:

(a) The grantee of property over which said grantee holds a utility easement;

(b) All properties to the extent of any easement therein other than a

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an easement which does not adversely affect the owner's use of the property;

(c) All Common Properties as defined in Article I, Section 2, hereof;

(d) All properties exempted from taxation by the laws of the State of South Carolina, upon the terms and to the extent of such legal exemptions;

(e) Properties owned by the Company used for recreation facilities; home and villa maintenance and service; meeting room and conference facilities and Dwelling Units occupied by the service and operating staff. Only land within the Existing Property which has been sub-divided into Lots, and the plats thereof filed for public record in the Beaufort County Court House shall constitute a Lot for purposes of these assessments. Projected Locations for future platted lots shown on the Master Plan will not be subject to assessment.

ARTICLE VI
Pparty WALLS

Section 1. General Rules of Law to Apply. Each wall which is built as a part of the original construction of the homes upon The Properties and placed on the dividing line between the Lots shall constitute a party wall, and to the extent not inconsistent with the provisions of this Article, the general rules of law regarding party walls and of liability for property damage due to negligent or willful acts or omissions shall apply thereto.

Section 2. Sharing of Repair and Maintenance. The cost of reasonable repair and maintenance of a party wall shall be shared by the Owners who make use of the wall in proportion to such use.

Section 3. Destruction by Fire or other Casualty. If a party wall is destroyed or damaged by fire or other casualty, any Owner who has used the wall may restore it, and if the other Owners thereafter make use of the wall, they shall contribute to the cost of restoration thereon in proportion to such use without prejudice, however, to the right of any such Owners to call for a larger contribution from the others under any rule of law regarding liability for negligent or willful acts or omission.

Section 4. Weatherproofing. Notwithstanding any other provision of this Article, an Owner who by his negligent or willful act causes the party wall to be exposed to the elements shall bear the whole cost of furnishing the necessary protection against such elements.

Section 5. Right to Contribution Runs with Land. The right of any Owner to contribution from any other Owner under this Article shall be appurtenant to the land and shall be an obligation running with the land and shall pass to such Owner's successors in title.

Section 6. Arbitration. In the event of any dispute arising concerning a party wall, or under the provisions of this Article, each party shall choose one arbitrator, and such arbitrators shall choose one additional arbitrator, and the decision of the majority of all the arbitrators shall be final and conclusive of the question involved.

ARTICLE VII
ARCHITECTURAL CONTROL

Section 1. Review and Approval of Landscaping Specifications for Additions, Alterations or Changes to Structures. No building, wall, fence, swimming pool, or other structure shall be commenced, erected, or maintained upon

swimming pool, or other structure shall be commenced, erected, or maintained upon the Common Properties, nor shall any landscaping be done, nor shall any exterior addition to any such existing structure or change or alteration therein, be made until the plans and specifications therefor showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to the harmony and compatability of its external design and location, with the surrounding structures and topography, by Lighthouse Beach Company and its duly appointed agent.

ARTICLE VIII
GENERAL PROVISIONS

Section 1. Duration and Amendments. The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association, the Developer, or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successors, and assigns, for a term of twenty (20) years from the date this Declaration is recorded, after which time said covenants shall be automatically extended for successive periods of ten (10) years unless three-fourths (3/4) of the vote at the annual meeting approves a change in the covenants and restrictions. The covenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change. Provided, however, that no such agreement to change shall be effective unless made and recorded sixty (60) days in advance of the effective date of such change, and unless written notice of the proposed agreement is sent to every Owner of a Lot or Dwelling Unit and the Company at least thirty (30) days in advance of any action taken. During the period ending one year from the date these covenants are recorded the Company may amend or add to these covenants, without the consent of the membership, to clarify or make provision for any items which the Company in its sole discretion considers necessary or desirable. The Company shall not, by reason of the power herein reserved, have the right to alter the amount, or method of making, annual or special assessments.

Section 2. Notices. Any notice required to be sent to any Member or Owner under the provisions of this Declaration shall be deemed to have been properly sent, and notice thereby given, when mailed, postpaid, to the last known address of the person who appears as Member or Owner on the records of the Association at the time of such mailing. Notice to one of two or more co-owners of a Lot or Dwelling Unit shall constitute notice to all co-owners. It shall be the obligation of every Member to immediately notify the Secretary of the Association in writing of any change of address.

Section 3. Enforcement. Enforcement of these covenants and restrictions shall be by any proceeding at law or in equity against any person or persons violating or attempting to violate or circumvent any covenant or restriction, either to restrain violation or to recover damage, and against the land to enforce any lien created by

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these covenants; and failure by the Association or any Owner or the Company to enforce any covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce same thereafter.

Section 4. Severability. Should any covenant or restriction herein contained, or any Article, Section, Sub-section, sentence, clause, phrase or term of this Declaration be declared to be void, invalid, illegal, or unenforceable, for any reason, by the adjudication of any court or other tribunal having jurisdiction over the parties hereto and the subject matter hereof, such judgment shall in no wise affect the other provisions hereof which are hereby declared to be severable, and which shall remain in full force and effect.

IN WITNESS WHEREOF the Developer has caused this instrument to be executed the day and year first above written, by its president and attested by its secretary, and the corporate seal affixed, pursuant to a resolution duly and unanimorsly adopted by its Board of Directors.

WITNESSES:

BY: LIGHTHOUSE BEACH COMPANY
SEA PINES MANAGEMENT COMPANY, INC.
GENERAL PARTNER

Carolyn Warren

By: Charles E. Fraser
As its President

Connie D. Herrman

By: D. L. McCrary
As its Secretary

The foregoing Declaration of Covenants and Restrictions is hereby approved and accepted as binding upon South Beach Owners Association, Inc., its successors and assigns.

IN WITNESS WHEREOF, South Beach Owners Association, Inc., has caused this instrument to be executed this 25th day of June, 1970, by its president and attested by its secretary, and its corporate seal to be hereto affixed.

WITNESSES:

SOUTH BEACH OWNERS ASSOCIATION, INC.

Carolyn Warren

By:
As its President

Connie D. Herrman

By: D. L. McCrary
As its Secretary

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

PROBATE

PERSONALLY appeared before me Carolyn Warren who, on oath, says that he saw the within named Lighthouse Beach Company by Sea Pines Management Company, Inc., General Partner, by Charles E. Fraser, its President and D. L. McCrary, its Secretary, sign the within instrument, and the said corporation, by said officers, seal said instrument and as its act and deed, deliver the same, and that he with Connie D. Herrman witnessed the execution thereof.

Carolyn Warren

SWORN to before me this

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SWORN to before me this

25th day of June, 1970.

Connie D. Herrman
Notary Public for South Carolina

My Commission Expires
October 14, 1978

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF BEAUFORT)

PERSONALLY appeared before me Carolyn Warren who, on oath, says that he saw the within-named South Beach Owners Association, Inc. by Harold Depkin its President and D. L. McCrary, its Secretary, sign the within instrument, and the said corporation, by said officers, seal said instrument and as its act and deed, deliver the same, and that he with Connie D. Herrman witnessed the execution thereof.

Carolyn Warren

SWORN to before me this

25th day of June, 1970.

Connie D. Herrman
Notary Public for South Carolina

My Commission Expires
October 14, 1978

EXHIBIT A

All that certain piece, parcel or block of land situate, lying and being on Hilton Head Island, in Beaufort County, South Carolina, shown and designated as South Beach on plat thereof recorded in the Office of the Clerk of Court for Beaufort County, South Carolina in Plat Book 18 at Page 126.

FILED	BEAUFORT COUNTY S. C.	RECORDED IN BOOK
AT 3:35 O'CLOCK P M	AUG 18 1970	176 PAGE 203

Bev Trueblood
CLERK OF COURT OF COMMON PLEAS

ELECTRONICALLY FILED - 2021 Sep 13 10:31 AM - BEAUFORT - COMMON PLEAS - CASE#2021CP0700795

ELECTRONICALLY FILED - 2021 Sep 13 10:31 AM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701655

Exhibit
Sea Pines South Beach
C

D006MOD:JPSjr:kg

J, S & P/J P S

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

MODIFICATION OF COVENANTS

THIS MODIFICATION OF COVENANTS, made this 18th day of October, 1985, by SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC. a South Carolina Non-Profit Corporation, with its principal place of business at Hilton Head Island, South Carolina, hereinafter referred to as the "Association".

W I T N E S S E T H :

WHEREAS, Lighthouse Beach Company, a South Carolina limited partnership, as the original owner and developer of the South Beach area of Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, did file certain Restrictive Covenants applicable to the Association in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 176 at Page 203, on August 18, 1970; and

WHEREAS, the Association, as successor in interest to Lighthouse Beach Company, voted at its annual meeting on August 3, 1985, by unanimous vote, to amend the Covenants of the Association as referenced above;

NOW, THEREFORE, the Association does herewith declare that the Covenants and Restrictions applicable to the Association are herewith republished and reaffirmed, except as modified herein.

The Declaration of Covenants and Restrictions for Sea Pines South Beach Owners Association, Inc., as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 176 at Page 203, are herewith amended as follows, to-wit:

Article 1, Section 1, Paragraph (c) - "Common Properties" is herewith amended by broadening the definition of Common Properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.

Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985, and recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 433 at Page 65.

FILED IN DEED - C BOOK 433 PAGE 57
FILED AT 094100 ON 10/22/85

FILED IN DEED - C BOOK 435 PAGE 532
FILED AT 09:33:00 ON 11/20/85

WHEREAS, this Modification was recorded on 10-22-85 in Book 433 at Page 67; and
WHEREAS, the name of the Owners Association was incorrectly written; and
WHEREAS, the correct name is Sea Pines South Beach Owners Association, Inc.; and
WHEREAS, this Modification has been corrected to reflect the correct name; and
WHEREAS, this Modification is being re-recorded to correct the records;
NOW, THEREFORE...

IN WITNESS WHEREOF, the Association has caused this instrument to be executed the day and year first above written, by its President and attested by its Secretary and the corporate seal affixed thereto, pursuant to the unanimous vote of the members of the Association, and with the full approval and consent of the Board of Directors of the Association.

WITNESSES:

SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC.

By: _____, President

Attest: _____, Secretary

Dowling

FILED IN DEED - C BOOK 435 PAGE 533
FILED AT 09:38:00 ON 11/20/85 50161
~~BOOK NUMBER 435 PAGES 532 533~~
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
P R O B A T E HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

PERSONALLY appeared before me, the ~~undersigned witness, and made oath~~ that s/he saw the within named SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., by its President and Secretary, sign, seal and deliver the within written Instrument, and that s/he, with the other witness whose signature appears above, witnessed the execution thereof.

SWORN to before me this 18th day of October, 1985.

Notary Public for South Carolina
My Commission Expires:
JAMES P. SCHNEIDER, JR.
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires November 25, 1991

Dowling

FILED IN DEED - C BOOK 433 PAGE 68
FILED AT 094100 ON 10/22/85 37354
BOOK NUMBER 433 PAGES 67- 68
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

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Exhibit
Sea Pines South Beach
D

DOO5DEED:JPSjr:kg

J.S & P/J P

THE STATE OF SOUTH CAROLINA,

COUNTY OF BEAUFORT.

QUIT-CLAIM DEED

TO ALL WHOM THESE PRESENTS MAY COME:

FILED IN REAL EST BOOK 435 PAGE 29
FILED AT 09:35:00 ON 11/20/85

WHEREAS: SEA PINES PLANTATION COMPANY, SENDS GREETING:

NOW, KNOW ALL MEN BY THESE PRESENTS, That the said SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY, as Grantor, in consideration of the premises and also in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) to it in hand paid at and before the sealing and delivery of these presents by SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., Post Office Box 5861, Hilton Head Island, South Carolina, as Grantee (the receipt whereof is hereby acknowledged), has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., its successors and assigns, forever, the following described "Common Properties", to-wit:

> All right, title and interest in and to the "Common Properties" of Braddock Cove described as all boat channels, waterways, channel markers, salt marsh open space areas, and all of Grantor's right, title and interest, if any, in the navigable waterways of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.
>
> Braddock Cove is generally shown and described on the General Land Use Map of Sea Pines Plantation, said map dated January, 1985, showing and depicting Braddock Cove as follows, to wit:
>
> Commencing at the southernmost intersection of Braddock Cove and Calibogue Sound, thence in an southerly direction along the shores of Land's End;
> Thence continuing in a southeasterly direction along the shores of Braddock Cove Club;
> Thence continuing in a southerly direction along the shores of South Beach Marina;
> Thence continuing in a southwesterly direction along the shores of Port Villas;
> Thence continuing in a northeasterly direction along the shores abutting Lots 9 and 21 of Wren Drive, Sea Pines Plantation;
> Thence continuing in a generally northwesterly direction along the shores of Lots 21, 22, 23, 24 of Gull Point Subdivision, the Gull Point Club Site, Lots 27, 28, and 29 of Gull Point Subdivision, Sea Pines Plantation;
> Thence continuing in a generally northwesterly direction to the northernmost intersection of Braddock Cove and Calibogue Sound adjacent to the general point of beginning.

TOGETHER with all and singular the rights, members, hereditaments and appurtenance to the said premises belonging or in anywise incident or appertaining:

WHEREAS, this Deed was recorded on 10-22-85 in Book 433 at Page 65; and
WHEREAS, the Grantee was incorrectly given as South Beach Owners Association, Inc., and
WHEREAS, the correct name is Sea Pines South Beach Owners Association, Inc.; and
WHEREAS, this Deed has been corrected to reflect the correct name of the Association; and
WHEREAS, this Deed is being re-recorded to correct the records;
NOW, THEREFORE...

FILED IN DEED BOOK 433 PAGE 65
FILED AT 09:41:00 ON 10/22/85

BEAUFORT COUNTY TAX MAP REFERENCE

Dist	Map	Submap	Parcel	Block
550	17		1203	

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TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said SEA PINES/SOUTH BEACH OWNERS ASSOCIATION, INC., its successors and assigns, forever--so that neither the said SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY, nor its successors, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof, forever.

WITNESS the hand and seal this 15th day of July, in the year of our Lord one thousand nine hundred and eighty-five and in the two hundred and tenth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered in the presence of

Barrier C Cave

Terry L Wynn

SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY,

By:

Attest:

THE STATE OF SOUTH CAROLINA,)
)
COUNTY OF BEAUFORT.)

P R O B A T E

PERSONALLY appeared before me, the undersigned witness, who on oath says that s/he saw the within named SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY, sign, seal and as its corporate act and deed, deliver the within written Deed; and that s/he, with the other witness whose signature appears above, witnessed the execution thereof.

Barrier C Cave

SWORN to before me, this 15th day of July, A.D. 1985.

Terry L Wynn

Notary Public for South Carolina
My Commission Expires: 10/28/92

FILED IN REAL EST BOOK 435 PAGE 530
FILED AT 03:38:00 ON 11/20/85

FILED IN DEED BOOK 433 PAGE 55
FILED AT 094100 ON 10/22/85 87353
BOOK NUMBER 433 PAGES 55- 56
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

RECORDED THIS 29th DAY OF October 1985 IN BOOK R PAGE 125
FEES $
Mary Ann Graves
AUDITOR BEAUFORT COUNTY, S C

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ELECTRONICALLY FILED - 2021 Sep 13 10:31 AM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701655

RECORDED THIS 20th DAY
OF November 19 85
IN BOOK R PAGE 179
FEES, $
Mary Ann Gray ISD
AUDITOR, BEAUFORT COUNTY, S. C.

Dowling
FILED IN REAL EST BOOK 435 PAGE 531
FILED AT 09:38:00 ON 11/20/85 90160
BOOK NUMBER 435 PAGES 529- 531
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

Exhibit
Sea Pines South Beach
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exhibitsticker.com

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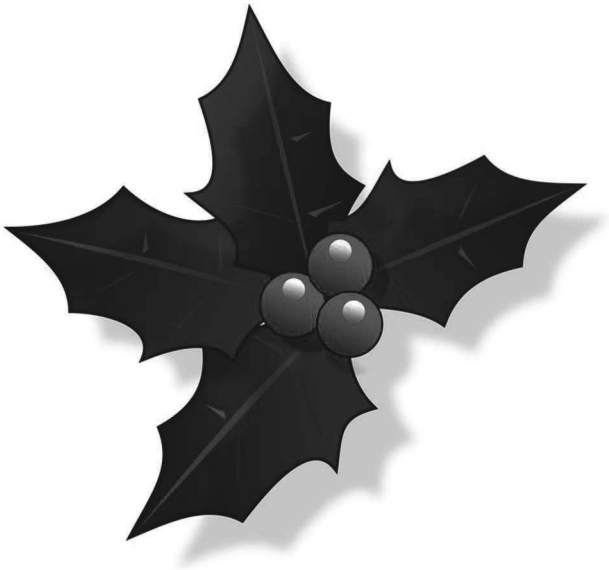
SOUTH BEACH NEWSLETTER

December 2020

'TIS THE SEASON



We extend best wishes to all our South Beach members and their families for a safe and happy holiday season. In this newsletter we will try to address some questions you may have about our Association and provide additional information about our history and what lies ahead. As most of you know, our Association was formed in 1970 by covenants for development of South Beach. Our membership area includes all properties, both residential and commercial, in the area starting at Scaup Court on the east side and South Beach Villas on the west and continuing to and including Lands End for a total of 511 properties. An aerial photo with the approximate line of the Association membership area is shown below. Unlike Sea Pines Plantation Property Owners (ASPPPO), which is voluntary, membership in our Association is mandatory because of the 1970 covenants.

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The Non-Meeting

The annual meeting scheduled for November 21 could not proceed because we lacked a quorum. Out of 511 properties we only had 239 properties represented by proxies or in person. This did not even reach majority, so the meeting had to be adjourned. Immediately afterward the existing Board of Directors, pursuant to the Covenants and By-Laws, appointed the new Board of Directors from among the homeowners who had submitted their names as candidates. Bob Lee was an existing Board member willing to continue so Bob remains on the Board. The others are Charlie Hughes, Jim Whalen, Tom Wolfe and Tim Ryan. The new Board has selected the following officers for the coming year: President – Tom Wolfe, Vice President and Treasurer – Bob Lee and Secretary – Charlie Hughes..

Dredging

Recently, maintenance dredging of Braddock Creek has been a significant focus of the Association. The Association, however, has served and will continue to serve as a voice for South Beach in other issues. Some of this history is explained in a later section of this newsletter.

Next Dredge

The next dredge will likely be the fall of 2022 or early 2023. The South Island Dredging Association (SIDA), of which our Association is a founding member, will initiate the dredge by soliciting bids from dredge contractors and developing a funding plan. As you may recall, our Association participated in the funding for dredges in 1999, 2013 and 2018. Our member, South Beach Marina, through Mr. Bob Gossett, funded somewhat more of the dredges in 2013 and 2018 than the rest of the Association. And, in a recent letter to you he has said that "South Beach Marina remains well funded and has the necessary capital earmarked for the upcoming maintenance dredge in 2022." He also said in his letter that "South Beach Marina will continue to participate in the dredging cycle." This is very good news, but we will not know the costs or final SIDA member participation until SIDA solicits bids and a final cost sharing agreement is consummated. If South Beach Marina funds the main channel, and if the 42 members with docks (Portside and Port Villas) and the two properties on Wren Drive (who are not members) with docks on the creek want to participate in the dredge, the Board may ask them to propose their own funding plan.

Association Assessments for Maintenance Dredging

Some members have questioned the right of the Association to assess for maintenance dredging of the Braddock Creek waterways. Let's be very clear at the outset – the State of South Carolina owns these waterways, now and for the last hundreds of years. As far as we have gone back, including a review of the written communications about the 2013 and 2018 dredges, the Association has never claimed to own the waterways. In fact, minutes from the December 1, 2018 annual meeting state that "An owner questioned SPSBOA's ownership of the waterways. GW [then president, George Williams] responded that [the] covenants do not require that SPSBOA have ownership of the waterways."

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The right of the Association to assess its members upon 75% approval for each dredge event is based on a 1985 amendment to the Covenants. This amendment, approved unanimously at the time, enlarged the definition of "Common Property" to include the waterways – even though the Association did not and does not own the waterways. In that amendment the waterways were further defined by what's known as a 'quit claim" deed from the former developer of South Beach, The Lighthouse Beach Company. A quit claim deed grants only those rights and obligations the grantor has. Since Lighthouse never owned the waterways it could not give them to the Association. Instead, the quit claim deed, in all likelihood, was a defensive measure to help ensure that Lighthouse could not be subjected to any responsibility for the waterways in the development of South Beach. The Association itself chose to include the waterways in its definition of Common Property. As a private organization, the Association had every right to do so. Therefore, the Association has the right upon 75% approval of participating members to assess for the maintenance of those waterways. Ownership of the waterways has nothing to do with this Association right.

Importance of the Maintenance Dredge Assessment

This Board believes the right to self-impose an assessment for maintenance dredging of the waterways with 75% approval is a significant right for the overall well-being of the South Beach community. We cannot know if the Board will ask the membership to approve an assessment for the 2022 maintenance dredge. That will depend on a number of factors. As noted earlier, if Mr. Gossett, through South Beach Marina, funds the entire main channel for the 2022 dredge the Board likely will look to the dock owners in the so-called Upper Creek (Portside and Port Villas) to determine whether they want to participate and, if so, ask them to propose a funding plan. However, we must look beyond the next dredge to the dredges that will affect future generations of South Beach owners. While we welcome and greatly appreciate Mr. Gossett's financial contributions to the maintenance dredging, we cannot know or rely on the actions of future owners of the Salty Dog properties. Having the right to self-impose a maintenance dredge assessment (or not) allows the Association members to determine for themselves the importance of maintaining Braddock Creek's navigability and the nautical ambiance it creates for all of South Beach.

The Association's Voice

As stated earlier, the Association has served as an important voice for South Beach since its creation in 1970 as part of the development of South Beach. We report here a few instances in recent memory where the Association's voice mattered.

The "Park" Between Lands End and Sound Villas

In 1997 the Association opposed the development of land parcels between Lands End and the Sound Villas on the Sound. A group had proposed building on the site. In response, the Association urged CSA to buy and preserve the properties in their undeveloped state. CSA did so and conveyed to the Association a right to purchase the parcels if CSA ever decided to sell them. This agreement was recorded in the County records and is a valuable right of the Association. Here it is today - a type of park for all of us.

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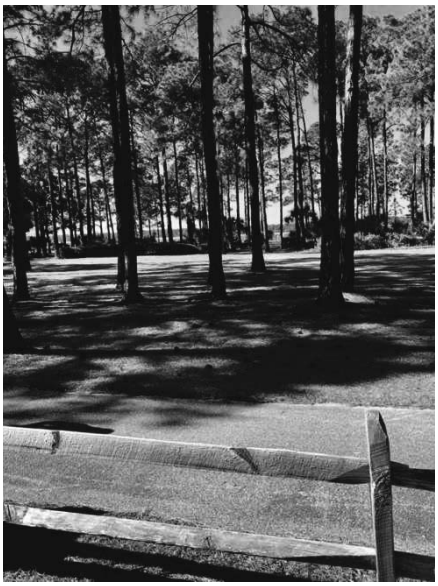

The Better Groin

In about 2004 the Association worked with the Town to replace the failing wood groin where Sound Beach meets Braddock Creek. The effort succeeded with a new and longer lasting stone groin. Here it is.

Hurricane Matthew Destruction

In 2016 Hurricane Matthew destroyed a large portion of the dam at the upper reaches of Braddock Creek. The Association communicated with CSA and the Town to achieve a successful

repair. Here are the two sides of that dam after repair

Professional Management

Over these last many years, the Association has been managed by our volunteer directors and officers. The Association has needed to manage considerable sums of money, especially for the dredges in 2013 and 2018. We are certain that all was handled appropriately but since then there have been two recent retirements that caused the Board to hire a professional management company. Longtime President, George Williams, and longtime Treasurer, Jim O'Brien, both understandably asked to retire after devoting so many years of selfless service. Accordingly, after considering two local companies, the Board entered a professional management contract earlier this year with High Tide Associates. High Tide introduced itself to you through earlier communications.

Plea for Email Addresses

To reduce our costs, and as recommended by High Tide, we want to be able to communicate with you by email. Most Members are receiving this newsletter right now by such manner. The approximate 20% for whom we do not have email addresses will be able to provide it via an information sheet that will be included in the postal mailing of the 2021 statements early in the new year.

Thank you for your interest and participation in our Association.

Respectfully,
Your Board of Directors
SPSBOA

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Exhibit
Sea Pines South Beach
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July 23, 2021

Via U.S. Mail and e-mail:

Sea Pines South Beach Owners' Association, Inc.
Board of Directors
c/o High Tide Associates
55 New Orleans Road, Suite 211
Hilton Head Island, SC 29928

High Tide Associates: mark@hightideassociates.com; dnskelly@hightideassociates.com
Bob Lee: domerrel@aol.com
Tom Wolfe: wolfeld@gmail.com
Charlie Hughes: cch@hughestenney.com
Timonthy Ryan: timothy.ryan@earthlink.net
Jim Whelan: Whelan.jim@gmail.com

Re: Derivative Demand Letter to Sea Pines South Beach Owners' Association, Inc.'s Board of Directors

Dear Board of Directors of Sea Pines South Beach Owners' Association, Inc.:

This law firm represents Robert Gossett, Stanley Stroup, and Peter Trager, who are all members of Sea Pines South Beach Owners' Association, Inc. ("SPSBOA"). This letter is sent to the SPSBOA board of directors in accordance with the requirements of South Carolina Rule of Civil Procedure 23, Federal Rule of Civil Procedure 23.1, S.C. Code § 33-7-400 *et seq.*, and S.C. Code § 33-31-304 *et seq*.

The purpose of this letter is to demand that the board of directors address actions and/or conditions that are improper, illegal, or unreasonable. In particular, the board of directors has assessed and contends that it is authorized to specially assess the members of SPSBOA, for the purpose of "maintenance dredging" of the Braddock Cove waterways. The Braddock Cove waterways are tidal waters. Land under tidal waters is owned by the State of South Carolina in trust for the public benefit, and not by SPSBOA.

Assessment for maintenance of land under tidal waters is outside the scope of SPSBOA's authority, in violation of its governing documents, and contrary to the property rights and obligations of its members.

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Some history of the community is important to the understanding of why special assessments by SPSBOA for dredging are *ultra vires* and unlawful:

In 1970, Lighthouse Beach Company, which was the owner and developer of a large tract of land in Sea Pines Plantation, subjected that land to the *Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina and Provisions for the Sea Pines South Beach Owners' Association, Inc.* (the "Declaration"). The Declaration was recorded in Book 176, Page 203 with the Beaufort County Clerk of Court.

The Declaration concerns the land described in the Declaration's "Exhibit A." The Declaration contemplates that certain portions of that described land would be deeded to SPSBOA to hold and manage as common property. SPSBOA's sole purpose is to manage and maintain common property for the benefit of its members. No land has been deeded to SPSBOA.

The members of SPSBOA are bound to pay certain assessments. The Declaration contains express provisions limiting the purpose of these assessments. The use of all assessments is restricted to paying for the support of the common property.

SPSBOA has taken the incorrect legal position that the Braddock Cove waterways are included within the Declaration's definition of "Common Properties" found in Article I, § 1(c). SPSBOA has argued that a Modification to the Declaration, recorded in 1985, amended the definition of "Common Properties" to include the boat channels and waterways of Braddock Cove and to eliminate the requirement that these common properties be owned by SPSBOA. This position is untenable for numerous reasons, including but not limited to:

- The purported Modification is invalid for failure to comply with the Declaration's amendment requirements (*see, e.g.*, Art. VIII, § 1).

- SPSBOA did not own any land subject to the Declaration in 1985, at the time that it purported to modify the Declaration. An organization that owns no land in a real estate development has no power to amend covenants relating to property in that development.

- There is no privity of estate between SPSBOA and the State of South Carolina (which owns the Braddock Cove waterways). Further, SPSBOA has no property interest in the waterways. Consequently, the land subject to the Declaration is not bound by the Modification.

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- Even if the modification was lawful, it did not alter the requirements imposed by the Declaration that "Common Properties" (*inter alia*) must be properties to which SPSBOA holds legal title (Art. I, § 1); must be added to the plan of the Declaration by a Supplemental Declaration filed by the owner of the added property (Article II, s2(b)); in which every member has an easement of enjoyment that is appurtenant to and passes with title to each lot (Art. IV § 1); and in which SPSBOA has a property interest sufficient to exercise the rights enumerated in Article IV, § 3. The Braddock Cove waterways do not meet these requirements.

- Special assessments may not be levied for maintenance purposes. (*See, e.g.*, Art. V, § 4).

- It is against public policy for a private entity to compel members to pay to support public property.

- Maintenance by SBSBOA of property in which it has no ownership interest is beyond the scope of SBSBOA's charter and is *ultra vires*.

- SPSBOA's membership in The South Island Dredging Association (SIDA) is beyond the scope of SPSBOA's charter and is *ultra vires*.

We urge the board to disclose these concerns to the full membership, and to direct a complete review of these issues by an independent committee. For at least the reasons above, SPSBOA lacks legal authority to assess it members for any dredging of Braddock Cove.

Consequently, our clients request that the board:

1. Withdraw SPSBOA from its membership in SIDA;
2. Provide an accounting of its use of all assessments paid by members of SPSBOA for the dredging of Braddock Cove;
3. Refrain from any action in furtherance of an assessment or otherwise paying for dredging;
4. Reduce dues to the minimum necessary to maintain the status of SPSBOA as a corporation in good standing under South Carolina law.

If necessary, our clients are willing to institute suit to accomplish the results sought, if the board of directors is unwilling to act promptly to make the changes

demanded herein. Our clients and other interested persons reserve the right to assert any further claims that may be or become colorable under applicable law. This letter is not an admission or acknowledgment that any of the issues summarized above necessarily must be brought as a derivative action, as opposed to other types of actions or redress permitted by law.

If you would like to discuss these matters further, please so advise. In any event, we would request substantive action and response to this letter within twenty (20) days.

Very truly yours,

Ian S. Ford

Ian.Ford@FordWallace.com

cc: Robert Gossett
Stanley Stroup
Peter Trager

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May 21, 2021

Via Email

Meredith Bannon, Esq.
The Bannon Law Group, LLC
P.O. Box 3691
Bluffton, SC 29910
meredith@bannonlawgroup.com

Re: Sea Pines South Beach Owners' Association

Dear Meredith:

As you know from our prior correspondence, we represent a group of members of the Sea Pines South Beach Owners' Association (the "Association"), namely, Robert Gossett, Stan Stroup, and Peter Trager. Our clients contend that the Association has no power to levy assessments because the Association does not own any Common Properties.

Article V, Section 2 of the Declaration of Covenants and Restrictions for Sea Pines South Beach Owners' Association, Inc. (the "Covenants") states that "[t]he Assessments levied by the Association shall be exclusively for the improvement, maintenance, and operation of Common Properties . . . ." The term "Common Properties" is defined in Article I, Section 1(c) of the Covenants as "those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as 'Common Properties'" and also includes "any personal property acquired by the Association if said property is designated as 'Common Property.'" The October 18, 1985 Modification of Covenants (the "Modification") did not change the aforementioned requirement, but it added "all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove" to the definition of Common Properties.

The only deed of record purporting to convey "Common Properties" to the Association is the Quit-Claim Deed from Sea Pines Plantation Company to the Association, dated July 15, 1985. This deed conveys Sea Pines Plantation Company's interest in those certain components of Braddock Cove listed in the Modification. There is no dispute that Braddock Cove is comprised of tidal navigable waters. Without evidence of a specific grant from the State of South Carolina, all land lying below the mean high-water mark of tidal navigable waters in South Carolina is owned by the State. Since there is no evidence of the State granting Sea Pines Plantation Company any interest in this Braddock Cove "property," the Quit-Claim Deed from Sea Pines Plantation Company conveyed nothing to the Association and the Braddock Cove "property" is not and never has been Common Property.

Your October 26, 2020 letter to me concerning this Common Property issue included a memorandum you provided to the Association's Board of Directors dated October 13, 2020. In addition to the Braddock Cove "property," this memorandum attempted to identify other Common Properties. However, the properties identified on Exhibit D of the memorandum are not currently and never were owned by the Association. Therefore, they do not qualify as Common Properties and we invite the Association to prove otherwise.

In light of the foregoing, the group we represent demands that the Association cease levying assessments immediately and refund assessments previously collected. Please acknowledge the Association's willingness to pursue a proper resolution of these demands by responding to me before June 15, 2021. Barring a satisfactory response, we will advise our clients to pursue all available legal remedies.

I trust you appreciate our clients' concerns and remain available to discuss this at your earliest convenience. The foregoing is for settlement purposes only and without prejudice to any remedy, claim, or defense otherwise available to our client under the law, all of which are expressly reserved.

Sincerely,

BELZER PC

Michael C. Cerrati

cc. Mr. Robert Gossett (by email only)
Mr. Stan Stroup (by email only)
Mr. Peter Trager (by email only)

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS
STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both *individually and derivatively*, Plaintiffs, vs. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant.	Case No. 2021-CP-07-1655 **DEFENDANT'S ANSWER TO PLAINTIFFS' COMPLAINT AND COUNTERCLAIM (Jury Trial Demanded)**

Defendant Sea Pines South Beach Owners' Association, Inc. answers the allegations in Plaintiffs' Complaint as follows and will respectfully show the Court and jury:

General Denial

1. Sea Pines South Beach Owners' Association, Inc. (the "Association") denies each and every allegation in Plaintiffs' Complaint unless admitted or explained.

Response to Allegations in Complaint

2. The Association admits Paragraph 1 of Plaintiffs' Complaint (hereinafter, e.g. Paragraph 1).

3. The Association admits that Peter Trager is an owner of the property located at 247 South Sea Pines Drive, as stated in Paragraph 2. The remaining allegations are denied as the Association lacks sufficient information to form a belief as to Mr. Trager's authorization by the other owners to represent their interests and if his appearance conforms with the Association's requirements.

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4. The Association lacks sufficient information to form a belief as to the statements in Paragraph 3 and therefore deny same.

5. The Association admits Paragraph 4.

6. Answering Paragraph 5, the Court has jurisdiction and venue is proper.

7. Paragraph 6 is admitted.

8. Answering Paragraph 7, Beaufort County is a proper venue.

9. Paragraph 8 is Plaintiffs' characterization of the lawsuit. No response is required.

10. The Association answers Paragraph 9 by referring to: the Code of Laws of South Carolina, Title 33, Article 31, the South Carolina Nonprofit Corporation Act; the Association's Certificate of Incorporation; the terms of the "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina and Provisions for the Sea Pines South Beach Owners' Association, Inc.", dated June 25, 1970 (the "1970 Covenants") and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Book 176 at Page 203; the plat of the subject 102.63 acre parcel ("the Property") recorded in Plat Book 18 at Page 126; and all other covenants, conditions, restrictions, and orders applicable to the Property.

11. Answering Paragraph 10, the document speaks for itself.

12. Paragraph 11 is denied.

13. Answering Paragraph 12, the document speaks for itself.

14. Answering Paragraph 13, the true, correct, and complete 1970 Covenants are recorded in Office of the Register of Deeds for Beaufort County, South Carolina in Book 176 at Page 203 and Plat Book 18 at Page 126.

15. The Association lacks sufficient information to form a belief as to the allegations in Paragraph 14 and therefore denies same.

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16. Answering Paragraph 15, the definitions set forth in the 1970 Covenants speak for themselves.

17. Answering Paragraph 16, reference is made to the 1970 Covenants.

18. Answering Paragraph 17, reference is made to the 1970 Covenants.

19. Answering Paragraph 18, reference is made to the 1970 Covenants.

20. Answering Paragraph 19, reference is made to the 1970 Covenants.

21. Answering Paragraph 20, a "Modification of Covenants" dated October 18, 1985, was filed and recorded in Deed Book 433 at Page 67 on October 22, 1985.

22. Paragraph 21 is admitted.

23. Paragraph 22 is denied.

24. Paragraph 23 is denied.

25. The Association, answering Paragraph 24, states the Modification of Covenants was properly approved by the Owners of record at the time.

26. Answering Paragraph 25, the Association admits the Modification of Covenants refers to a quit-claim deed. The Association denies Plaintiffs' characterization of the document, which speaks for itself.

27. Paragraph 26 is admitted.

28. The Association lacks sufficient information to form a belief as to the allegations in Paragraph 27 and therefore denies same.

29. Answering Paragraph 28, the Association responds that the Paragraph is an argument, not an allegation, for which Plaintiffs have the burden of proof. Consequently, the Paragraph is denied.

30. Answering Paragraph 29, the Association responds that the Paragraph is an argument,

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not an allegation, for which Plaintiffs have the burden of proof. Consequently, the Paragraph is denied.

31. Paragraph 30 is a copy of the December 2020 South Beach Newsletter.

32. Paragraph 31 is denied.

33. Answering Paragraph 32, the Association levies assessments as authorized by the 1970 Covenants and subsequent amendments, modifications, and additions of and to the Covenants.

34. Answering Paragraph 33, the Association has levied Special Assessments for dredging on some, but not all, owners in the past.

35. Answering Paragraph 34, the Association has from time to time levied assessments as stated in stated in Paragraphs 33 and 34 above.

36. Paragraph 35 is denied.

37. Paragraph 36 is denied.

38. Answering Paragraph 37, the Association is a member of South Island Dredging Association. The remainder of the allegations are denied.

39. Paragraph 38 requires no response.

40. Paragraph 39 is admitted.

41. The Association lacks knowledge of Plaintiffs' intent and therefore denies Paragraph 40.

42. Answering Paragraph 41, the Association received communications over the years from numerous law firms representing some or all of Plaintiffs and related entities regarding membership status, dues, assessments, and dredging.

43. Paragraph 42 is admitted.

44. Paragraph 43 is denied.

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45. Paragraph 44 is denied.

46. Paragraph 45 is denied.

47. Answering Paragraph 46, the Association incorporates its responses set forth in Paragraphs 1-46 above as if fully set forth herein.

48. Answering Paragraph 47, S.C. Code Ann. §15-53-10 *et seq*. is the Uniform Declaratory Judgments Act.

49. Answering Paragraph 48, each Plaintiff acquired title to his or its property subject to the applicable covenants, conditions, restrictions of record and applicable orders on the date of the acquisition of the property, and each property is subject to said covenants, conditions, restrictions, and applicable orders including without limitations the 1970 Covenants and their additions and modifications applicable to owners of property within the boundary of the Property denominated as Sea Pines South Beach, recorded in Plat Book 18 at Page 126 in the Office of the Register of Deeds for Beaufort County.

50. Paragraph 49 is denied.

51. Plaintiffs statement in Paragraph 50 that Plaintiffs have not paid one or more Annual Assessments is an admission, not an allegation, and no response is required. The Association knows of no liens filed of record against Plaintiffs.

52. Paragraph 51 is denied.

53. Answering Paragraph 52 and the subparts therein, the Association states that its actions are lawful and proper, the declaratory judgment action is improper, the declarations sought are not merited, and Plaintiffs requested judgment be denied.

54. Answering Paragraph 53, the Association incorporates its responses set forth in Paragraphs 1-53 above as if fully set forth herein.

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55. Paragraph 54 is denied.

56. Answering Paragraph 55, the Association states that Plaintiffs are not entitled to the relief sought.

For a First Affirmative Defense, as to Vacation Inn, LLC only: Violation of Rule 11, SCRCP.

57. Vacation Inn, LLC's Complaint is improper, raising issues it has litigated and lost previously, and is vexatious and harassing. Its claims are frivolous. Vacation Inn, LLC attempts to litigate anew issued raised, argued, and lost in previous litigation by it in this Court, the Court of Appeals, and the Supreme Court of South Carolina.

58. Vacation Inn, LLC's claims should be stricken from the Complaint. The Association reserves the right to file a motion for sanctions as permitted by Rule 11(c) (2) SCRCP if the improper claims are not withdrawn or corrected within 21 days of the date hereof.

For a Second Affirmative Defense: No Justiciable Controversy

59. Plaintiffs fail to plead a justiciable controversy for which declaratory relief may be granted.

For a Third Affirmative Defense: Lack of Derivative Status

60. Plaintiffs' Complaint does not state facts which give rise to a derivative action. Plaintiffs' claims should be dismissed.

For a Fourth Affirmative Defense: Failure to Join Necessary Parties

61. Plaintiffs fail to join all necessary parties as required by S. C. Code Ann. §15-53-80.

For a Fifth Affirmative Defense, as to Plaintiffs Stroup and Trager: Lack of Verification

62. Plaintiffs Stroup and Trager did not verify their pleading and their derivative claims

should be dismissed.

For a Sixth Affirmative Defense as to Plaintiffs Trager and Vacation Inn, LLC: *De Minimis* Interest

63. Any injury or damage to Plaintiffs Trager and Vacation Inn, LLC is *de minimus* and the court should apply the doctrine *de minimus non curat lex*.

For a Seventh Affirmative Defense: Lack of Standing

64. Plaintiffs lack standing to challenge any action by the Association before becoming owners of property in Sea Pines South Beach.

65. Plaintiffs lack standing to file an action against the Association, a South Carolina non-profit corporation.

66. Plaintiff Vacation Inn. LLC lacks standing to object to Special Assessments relating to dredging in that it has not been assessed for any ratable share of the costs.

For an Eighth Affirmative Defense as to Vacation Inn, LLC: *Res Judicata*

67. Plaintiff Vacation Inn, LLC previously filed a lawsuit in this Court in which the issues of the rights and obligations of the Association and Vacation Inn, LLC were adjudicated, including the right of the Association to levy Special Assessments for dredging. All issues raised by Plaintiff Vacation Inn, LLC in this matter were resolved, or in controversy and waived in its earlier litigation.

For a Ninth Affirmative Defense: Collateral Estoppel

68. Plaintiffs are estopped from asserting their claims. The issues rights and obligations of the Association and its members has been determined in prior litigation.

For Tenth Affirmative Defense: Statute of Limitations

69. The claims of Plaintiffs are time barred.

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For an Eleventh Affirmative Defense: Equitable Estoppel

69. Plaintiffs benefit and have benefitted in the past from the actions of the Association, including the dredging of Braddock Cove, and should be estopped from any relief.

For a Twelfth Affirmative Defense: No Justiciable Controversy

70. The issues raised by Plaintiff for which declaratory relief is not sought are either decided by previous order of this Court or illusory. There is no real controversy before the Court.

For a Thirteenth Affirmative Defense: Waiver

71. Each Plaintiff purchased its property with the full knowledge of the covenants, conditions, and restrictions on their property and their obligations as owners to pay Annual and Special Assessments.

72. Each Plaintiff continues by their own choice to own, use, and enjoy their property.

For a Fourteenth Affirmative Defense: Discharge by Bankruptcy

73. Any claim or objection regarding any act or omission by the Association occurring on or before October 25, 1987 is barred by bankruptcy.

Demand for Jury Trial

74. Defendant requests a jury trial as allowed by S. C. Code Ann §15-53-90.

COUNTERCLAIMS

Declarative Relief

75. The Association requests the Court to enter its Order declaring:

a. The Association, a South Carolina Nonprofit Corporation, has among its general powers the authority to enter into contracts;

b. The Association, as the entity created to preserve, maintain, and administer the

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"parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhouse areas, and other Common Property" has the right and obligation to enter into contracts necessary to preserve, maintain, and administer the Property for the Owners.

c. The Association has the authority under the 1970 Covenants to levy Annual and Special Assessments as stated in Article V of the Covenants for the preservation, maintenance, and administration of the Property.

Monies Owed

76. Plaintiffs have admitted that they "have not paid not paid one or more Assessments levied by the Association."

77. The 1970 Covenants require payment of Annual and Special Assessments and Section 9 gives the Association the right to commence actions for the collection of unpaid and past due assessments.

Attorney's Fees and Costs

78. Section 9 of the 1970 Covenants further provides that the Association will be paid its attorney's fees and costs for the collection of the unpaid assessments and interest at the stated rate.

WHEREFORE, having fully answered Plaintiffs' Complaint, Sea Pines South Beach Owners' Association, Inc. respectfully asks the Court to:

1. Deny the relief sought by Plaintiffs and grant judgment to the Association on all matters plead against it;

2. Either immediately dismiss the claims plead by Vacation Inn, LLC or direct Vacation Inn, LLC to remove or modify all objectionable claims within 21 days, reserving for the

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Association the right to seek sanctions as allowed by Rule 11, SCRCP;

3. Grant the Association the declarative relief set forth in Paragraph 75 above, including but not limited to, the Association's right to enter into contracts for the preservation, maintenance, and administration of the Property, and the right to enter into contracts and agreements for dredging within or for the benefit of the Property;

4. Grant judgment to the Association for the amount of any unpaid assessments and interest at the stated rate;

5. Award the Association its attorney's fees and costs for the defense of this action and collection of past due assessments; and

6. Such other relief as the Court may find just and proper

s/ J. Michael Jordan

J. Michael Jordan, SC Bar No. 3220
NEXSEN PRUET, LLC
Suite 900
104 South Main Street, (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
Telephone: 864.282.1157
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Attorneys for Defendant
SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.

October 18, 2021
Greenville, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS
STANLEY S. STROUP, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both individually and derivatively, Plaintiffs, vs. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant.	Case No. 2021-CP-07-1655 **DEFENDANT'S SECOND AMENDED ANSWER TO PLAINTIFFS' COMPLAINT AND COUNTERCLAIM**

Defendant Sea Pines South Beach Owners' Association, Inc., answering the allegations in Plaintiffs' Complaint, files this Second Amended Answer to Plaintiffs' Complaint and Counterclaim and will respectfully show the Court:

GENERAL DENIAL

1. Sea Pines South Beach Owners' Association, Inc. (the "Association") denies each and every allegation in Plaintiffs' Complaint unless admitted or explained.

RESPONSE TO ALLEGATIONS IN COMPLAINT

2. The Association admits Paragraph 1 of Plaintiffs' Complaint (hereinafter, e.g. Paragraph 1).

3. The Association admits that Peter Trager is a co-owner of property located at 247 South Sea Pines Drive, as stated in Paragraph 2. The remaining allegations are denied as the Association lacks sufficient information to form a belief as to Mr. Trager's authorization by the other owners to represent their interests and if his appearance conforms to the Association's requirements.

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4. The Association lacks sufficient information to form a belief as to the specific statement in Paragraph 3 and therefore denies same. Rather, the Association states that Vacation Inn, LLC owns multiple properties in South Beach.

5. The Association admits Paragraph 4.

6. Answering Paragraph 5, the Court has personal jurisdiction and venue is proper. As set forth in Defendant's Affirmative Defenses, the Association denies the Court has subject-matter jurisdiction.

7. Paragraph 6 is admitted.

8. Answering Paragraph 7, Beaufort County is a proper venue.

9. Paragraph 8 is Plaintiffs' mischaracterization of the lawsuit and is denied.

10. The Association answers Paragraph 9 by referring to: the Code of Laws of South Carolina, Title 33, Article 31, the South Carolina Nonprofit Corporation Act; the Association's Certificate of Incorporation and amendments thereto; the terms of the "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina and Provisions for the Sea Pines South Beach Owners' Association, Inc.", dated June 25, 1970 (the "1970 Covenants"), recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in Book 176 at Page 203; the By-Laws of the Association; the 1985 Modification of Covenants; and other covenants, conditions, restrictions that relate to Sea Pines South Beach, Sea Pines, Hilton Head Island, South Carolina.

11. Answering Paragraph 10, the document speaks for itself.

12. Paragraph 11 is denied.

13. Answering Paragraph 12, the document speaks for itself.

14. Answering Paragraph 13, the true, correct, and complete 1970 Covenants are recorded

in Office of the Register of Deeds for Beaufort County, South Carolina in Book 176 at Page 203.

15. Answering Paragraph 14, Plaintiffs are referred to Paragraphs 2, 3, and 4 above as to their respective ownership of property in South Beach. Plaintiffs by their own admission have not paid the assessments due from Owners. The Association denies on information and belief that Plaintiffs have all legal and/or equitable rights as Members.

16. Answering Paragraph 15, the definitions set forth in the 1970 Covenants speak for themselves.

17. Answering Paragraph 16, reference is made to the 1970 Covenants.

18. Answering Paragraph 17, reference is made to the 1970 Covenants.

19. Answering Paragraph 18, reference is made to the 1970 Covenants.

20. Answering Paragraph 19, reference is made to the 1970 Covenants.

21. Answering Paragraph 20, a "Modification of Covenants" dated October 18, 1985, was filed and recorded in Deed Book 433 at Page 67 on October 22, 1985.

22. Paragraph 21 is admitted.

23. Paragraph 22 is denied.

24. Paragraph 23 is denied.

25. Answering Paragraph 24, the Modification of Covenants states it was unanimously approved by the Owners of record at the time.

26. Answering Paragraph 25, the Modification of Covenants refers to a quit-claim deed. The Association denies Plaintiffs' characterization of the document, which speaks for itself.

27. Paragraph 26 is admitted.

28. The Association does not claim any ownership in "tidal waters". The Association denies the remaining allegations in Paragraph 27.

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29. Answering Paragraph 28, the Association responds that the Paragraph is an argument, not an allegation, for which Plaintiffs have the burden of proof. Consequently, the Paragraph is denied.

30. Answering Paragraph 29, the Association responds that the Paragraph is an argument, not an allegation, for which Plaintiffs have the burden of proof. Consequently, the Paragraph is denied.

31. Paragraph 30 is a copy of the December 2020 South Beach Newsletter.

32. Paragraph 31 is denied.

33. Answering Paragraph 32, the Association levies assessments as authorized by the 1970 Covenants and subsequent amendments, modifications, and additions of and to the Covenants.

34. Answering Paragraph 33, the Association levied assessments approved by its Members to fund the costs of dredging.

35. Answering Paragraph 34, the South Island Dredging Association, Inc. ("SIDA), of which the Association is a member, obtained permits from the United States Department of the Army Corps of Engineers and the South Carolina Department of Health and Environmental Control to dredge certain areas in Sea Pines, Hilton Head Island, South Carolina, including Braddock Cove. The Association from time to time submitted the question of dredging and the funding for dredging to its Members for approval and after approval levied assessments as stated in Paragraph 34 above.

36. Paragraph 35 is denied.

37. Paragraph 36 is denied.

38. Answering Paragraph 37, the Association is a member of South Island Dredging Association. The remainder of the allegations are denied.

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39. Paragraph 38 requires no response.

40. Answering Paragraph 39, the Association restates its response in Paragraph 15 above.

41. The Association lacks knowledge of Plaintiffs' intent and therefore denies Paragraph 40.

42. Answering Paragraph 41, the Association received the letters referenced in Paragraph 41.

43. Paragraph 42 is admitted.

44. Paragraph 43 is denied.

45. Paragraph 44 is denied.

46. Paragraph 45 is denied.

47. Answering Paragraph 46, the Association incorporates its responses set forth in Paragraphs 1-46 above as if fully set forth herein.

48. Answering Paragraph 47, S.C. Code Ann. §15-53-10 *et seq*. is the Uniform Declaratory Judgments Act.

49. Answering Paragraph 48, each Plaintiff acquired title to his or its property subject to the applicable covenants, conditions, restrictions of record and applicable orders on the date of the acquisition of the property, and each property is subject to numerous covenants, conditions, restrictions, and applicable orders, including without limitation the 1970 Covenants, additions and modifications of the 1970 Covenants including the 1985 Modification, and By-Laws of the Association applicable to Owners of property within Sea Pines South Beach.

50. Paragraph 49 is denied.

51. No response is required to Plaintiffs statement in Paragraph 50 that Plaintiffs have not paid one or more Annual Assessments. There are no liens filed of record by the Association against

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Plaintiffs.

52. Paragraph 51 is denied.

53. Answering Paragraph 52 and the subparts therein, the Association states that Plaintiffs have no legal right to request the relief, the Association's actions were or are lawful and proper, the Members of the Association ratified the Association's actions, the declaratory judgment action is improper, the declarations sought by Plaintiffs are not merited, and Plaintiffs requested judgment should be denied.

54. Answering Paragraph 53, the Association incorporates its responses set forth in Paragraphs 1-53 above as if fully set forth herein.

55. Paragraph 54 is denied.

56. Answering Paragraph 55, the Association states that Plaintiffs are not entitled to the relief sought.

FOR A FIRST AFFIRMATIVE DEFENSE, AS TO VACATION INN, LLC ONLY: VIOLATION OF RULE 11, SCRCP

57. Vacation Inn, LLC's Complaint is improper, raising issues it litigated and lost previously, and is vexatious and harassing. Its claims are frivolous. Vacation Inn, LLC attempts to litigate anew issued raised, argued, and lost in previous litigation by it in this Court, the Court of Appeals, and the Supreme Court of South Carolina. See *Catwalk, LLC, Vacation Inn, LLC, et al. v. Sea Pines South Beach Owners' Association, Inc.,* 2014-CP-07-1435, *affirmed* 2018-UP-069, S. C. Ct. App. dated Feb. 7, 2018, *cert denied*.

58. Vacation Inn, LLC's claims should be stricken from the Complaint. The Association further reserves the right to file a motion for sanctions as permitted by Rule 11(c) (2) SCRCP as the improper claims were not withdrawn or corrected as requested within 21 days of the date of the Association's Answer.

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FOR A SECOND AFFIRMATIVE DEFENSE: NO DAMAGES

59. Plaintiffs fail to plead any damages. Plaintiffs chose not to pay recent dues owing as Owners and Members of the Association. No Special Assessment is pending.

FOR A THIRD AFFIRMATIVE DEFENSE: NO JUSTICIABLE CONTROVERSY

60. Plaintiffs fail to plead a justiciable controversy for which declaratory relief may be granted. The 1970 Covenants state that the Association may levy annual assessments, the assessments for the Owners contribution to the costs of dredging were approved and ratified by votes of the Members, and there is no Special Assessment pending.

FOR A FOURTH AFFIRMATIVE DEFENSE: LACK OF DERIVATIVE STATUS

61. Plaintiffs' Complaint does not state facts which give rise to a derivative action, specifically any failure by the Association to enforce a right of the Association.

62. All acts of the Association, including the levying and collection of annual and special assessments, were for the benefit of the Members, authorized by the Covenants, and/or approved and ratified by vote of the Members, votes in which Plaintiffs participated. Plaintiffs do not fairly and adequately represent the interests of the Association Members. Rather, Plaintiffs claims are contrary to the express decisions of the Members.

63. Plaintiffs' Complaint does not plead facts that show any injury to the Association or its Members. Rather, as stated in Paragraph 62 above, all acts were done with the express approval of the Association Members.

64. Plaintiffs' Complaint does not plead facts that show their claims are legally substantial.

FOR A FIFTH AFFIRMATIVE DEFENSE: RATIFICATION

65. Even if the dredging of Braddock Cove was not permitted by the terms of the Covenants, or the Covenants as Modified, which Defendant denies, the acts were ratified by the

votes by the Members approving the dredging and assessments.

FOR A SIXTH AFFIRMATIVE DEFENSE, AS TO PLAINTIFFS STROUP AND TRAGER: LACK OF VERIFICATION

66. Plaintiffs Stroup and Trager did not verify their pleading when filed and their derivative claims should be dismissed.

FOR A SEVENTH AFFIRMATIVE DEFENSE: NO STANDING TO CHALLENGE THE OWNERSHIP INTERESTS OF DEFENDANT OR THE STATE OF SOUTH CAROLINA

67. Plaintiffs' argument that title to Braddock Cove waterways is vested in the State of South Carolina is insufficient to support this action. Plaintiffs have no possessory interest. There is no dispute between the Association and the State as to the ownership of property in South Beach. Plaintiffs have no legal right to challenge the title of the State or the Association, or require the Association or the State to defend its title, as Plaintiffs have no legal interest.

FOR AN EIGHTH AFFIRMATIVE DEFENSE AS TO PLAINTIFFS: *DE MINIMIS* INTEREST

68. If there is any injury or damage to each Plaintiff, which is specifically denied, it is *de minimus*.

FOR A NINTH AFFIRMATIVE DEFENSE: LACK OF STANDING

69. Plaintiffs lack standing to challenge any action by the Association before becoming owners of property in Sea Pines South Beach.

70. Plaintiffs lack standing to file an action against the Association, a South Carolina non-profit corporation.

71. Plaintiff Vacation Inn. LLC lacks standing to object to assessments relating to

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dredging. Any payment for the benefit of properties owned by Vacation Inn, LLC was made by South Beach Marina, Inc., a separate and independent member of SIDA, or other entities owned and/or controlled by Robert A. Gossett, the principal of Vacation Inn, LLC.

FOR A TENTH AFFIRMATIVE DEFENSE AS TO VACATION INN, LLC: *RES AJUDICATA*

72. Plaintiff Vacation Inn, LLC previously filed a lawsuit in this Court (*Catwalk, LLC, Vacation Inn, LLC, et al. v. Sea Pines South Beach Owners' Association, Inc.,* 2014-CP-07-1435, *affirmed* 2018-UP-069, S. C. Ct. App. dated Feb. 7, 2018, *cert denied*) that resulted in an Order, upheld on appeal, finding that Vacation Inn, LLC was subject to the Covenants. Vacation Inn, LLC, as Plaintiff in the earlier lawsuit raised or had the full and fair opportunity to plead and litigate all issues related to the Sea Pines South Beach covenants including the issues raised in this lawsuit. This action is barred by the doctrine of *res adjudicata*.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE: COLLATERAL ESTOPPEL/ISSUE PRECLUSION

73. All Plaintiffs are estopped and/or precluded from asserting their claims by the prior litigation referenced in Paragraph 72.

FOR A TWELFTH AFFIRMATIVE DEFENSE: SC CODE §33-31-304(B)

74. Plaintiffs' claim that the Association's acts are *ultra vires* is barred by S.C. Code §33-31-304(b).

FOR A THIRTEENTH AFFIRMATIVE DEFENSE: PREEMPTION

75. The dredging at issue in Plaintiffs' Complaint is pursuant to permits from the United States Department of the Army Corps of Engineers and the South Carolina Department of Health and Environmental Control, which have the exclusive right to issue permits for dredging navigable

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waters. The Court lacks jurisdiction over these issues.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE: FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES (DEPARTMENT OF THE ARMY CORPS OF ENGINEERS)

76. The rules and regulations of the Department of the Army Corps of Engineers provide the exclusive procedure for personal and legal objections and challenges to an application for the issuance of a permit to dredge. Plaintiffs did not timely object in the permitting process and failed to exhaust their administrative remedies. Their failure to exhaust their remedies precludes any subsequent challenge in this Court to the legitimacy and execution of the permit issued by the Corp of Engineers.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE: FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES (SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL)

77. The rules and regulations of the South Carolina Department of Environmental Control provide the exclusive procedure for personal and legal objections and challenges to an application for the issuance of a permit to dredge. Plaintiffs did not timely object in the permitting process and failed to exhaust their administrative remedies. Their failure to exhaust their remedies precludes any subsequent challenge in this Court to the legitimacy and execution of the permit issued by the Department of Health and Environmental Control.

FOR A SIXTEENTH AFFIRMATIVE DEFENSE: STATUTE OF LIMITATIONS

78. The claims of Plaintiffs are time barred.

FOR A SEVENTEENTH AFFIRMATIVE DEFENSE: EQUITABLE ESTOPPEL

79. Plaintiffs benefit and have benefitted in the past from the actions of the Association,

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including the dredging of Braddock Cove, and should be estopped from any relief.

FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE TO PETER TRAGER: ESTOPPEL

80. Plaintiff Peter Trager is estopped from raising any challenge to the 2013 dredging.

FOR A NINETEENTH AFFIRMATIVE DEFENSE TO VACATION INN, LLC: ESTOPPEL

81. That Robert Gossett, Jr., the principal of Vacation Inn, LLC, in connection with the development and improvement of his properties known as South Beach Marina Village, including properties owned by Plaintiff Vacation Inn, LLC, solicited and accepted a Quit-Claim deed from the Association for Common Property in the playground area of South Beach. Vacation Inn, LLC recognized and acknowledged the Association's ownership of Common Property by requesting the Deed and is estopped from any contrary position.

82. In Vacation Inn, LLC's previous lawsuit against Defendant identified in Paragraph 72 above, Vacation Inn, LLC affirmatively asserted the Defendant's ownership of Common Property.

FOR A TWENTIETH AFFIRMATIVE DEFENSE: WAIVER

83. Each Plaintiff purchased their property with the notice of the applicable covenants, conditions, and restrictions on their property and their obligations as Owners to pay Annual and Special Assessments.

84. Plaintiffs by their own choice continue to own, use, and enjoy their property.

FOR A TWENTYFIRST AFFIRMATIVE DEFENSE: DISCHARGE BY BANKRUPTCY

85. Any claim or objection regarding any act or omission by the Association occurring on or before October 25, 1987 is barred by bankruptcy, including, by way of illustration, any challenge to the 1985 Modification of Covenants. The Court lacks jurisdiction over any matter

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determined in the bankruptcy proceedings.

WHEREFORE, Defendant Sea Pines South Beach Owners' Association, Inc. respectfully asks the Court to deny all relief sought in Plaintiffs' Complaint and dismiss all claims with prejudice.

BY WAY OF COUNTERCLAIMS

DECLARATIVE RELIEF

86. The Association requests the Court to enter its Order declaring:

a. In a previous litigation, this Court found that the Sea Pines South Beach Covenants, as modified and amended from time to time, are enforceable. That finding, affirmed on appeal, binds the Court in the present action. The Covenants, as modified from time to time, are valid and enforceable;

b. The 1970 Covenants provide that the Association may levy annual assessments on the Members and Special Assessments;

c. The Association, as the entity created to preserve, maintain, and administer the "parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhouse areas, and other Common Property" may enter into contracts it deems appropriate for the benefit of the Owners.

d. The assessments at issue for dredging Braddock Cove were approved by vote of the Members;

e. The votes of the Members approving the assessments for dredging ratify the actions of the Association;

f. The Association, a South Carolina Nonprofit Corporation, has among its general

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powers the authority to enter into contracts, including the SIDA Agreement;

g. The Association is a signatory to the SIDA Agreement and related agreements and has rights in the contracts. Any challenge to the Association's acts are barred by the statute law of South Carolina, S.C. Code §33-31-304(b).

DEFENDANT REQUESTS A JURY TRIAL AS THE COURT MAY DEEM LEGAL AND APPROPRIATE FOR FOLLOWING CLAIMS FOR MONIES OWED AND FEES AND COSTS:

MONIES OWED

87. Plaintiffs have admitted that they "have not paid not paid one or more Assessments levied by the Association."

88. The 1970 Covenants require payment of Annual and Special Assessments and Section 9 gives the Association the right to commence actions for the collection of due and unpaid and assessments.

ATTORNEY'S FEES AND COSTS

89. Section 9 of the 1970 Covenants further provides that the Association will be paid its attorney's fees and costs for the collection of the unpaid assessments and interest at the stated rate.

90. That the Court grant judgement to the Association against Plaintiffs, jointly and severally, for the Association's attorney's fees, costs, and expenses for this improvident derivative action.

91. In the alternative or as additional relief, that the Court grant judgment to the

Association against Plaintiff Vacation Inn, LLC for the Association's attorney's fees, costs, and expenses for breach of the SIDA agreement.

92. As additional relief, that the Court grant judgment to the Association against Plaintiff Vacation Inn, LLC for SCRCP Rule 11 sanctions, the Association having satisfied all conditions predicate for relief.

WHEREFORE, having fully answered Plaintiffs' Complaint, Sea Pines South Beach Owners' Association, Inc. respectfully asks the Court to:

1. Deny the relief sought by Plaintiffs and grant judgment to the Association on all matters plead against it;

2. Grant the Association the declarative relief set forth in Paragraph 86 above;

3. Grant judgment to the Association for the amount of any unpaid assessments and interest at the stated rate;

4. Award the Association its attorney's fees and costs for the defense of this action and collection of past due assessments as deemed appropriate for the reasons enumerated in Paragraphs 89-92 above; and

5. Such other relief as the Court may find just and proper

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s/ J. Michael Jordan

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SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.

January 30, 2023
Greenville, South Carolina

ELECTRONICALLY FILED - 2023 Feb 08 3:49 PM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701655

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, *each both individually and derivatively*, Plaintiffs/Counterclaim Defendants, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant/Counterclaim Plaintiff.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action no. 2021-CP-07-01655 **PLAINTIFFS' REPLY TO DEFENDANT'S SECOND AMENDED ANSWER TO COMPLAINT AND PLAINTIFFS' ANSWER TO COUNTERCLAIMS**

Plaintiffs and Counterclaim Defendants Stanley Stroup as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, Peter Trager, and Vacation Inn, LLC (collectively "Plaintiffs"), by and through the undersigned attorneys, answer and deny the Amended Counterclaims of Defendant and Counterclaim Plaintiff Sea Pines South Beach Owners' Association, Inc. (the "Association"). All allegations not specifically admitted below are denied.

1–85. Paragraphs 1-85 constitute the responses and affirmative defenses to Plaintiffs' original Complaint, to which no response is required. To the extent a response is required, the allegations are denied.

86. Answering Paragraph 86, including its subparts, Plaintiffs deny that the Association is entitled to the judgments requested.

87. Plaintiffs' statements in the Complaint speak for themselves, and reference is made thereto and are incorporated herein. Any other allegations are denied.

88. Regarding the allegations in paragraph 88, the instrument described by the Association speaks for itself and reference is made thereto and it is incorporated herein. Any other allegations are denied.

89. Regarding the allegations in paragraph 89, the instrument described by the Association speaks for itself and reference is made thereto and it is incorporated herein. Any other allegations are denied.

90. Answering Paragraph 90, Plaintiffs deny that the Association is entitled to the judgment requested or to any relief, costs, or damages whatsoever from Plaintiffs.

91. Answering Paragraph 91, Plaintiffs deny that the Association is entitled to the judgment requested or to any relief, costs, or damages whatsoever from Plaintiffs.

92. Answering Paragraph 92, Plaintiffs deny that the Association is entitled to the judgment requested or to any relief, costs, or damages whatsoever from Plaintiffs.

The requests and allegations in the paragraph beginning WHEREFORE are denied, including subparagraphs 1–5.

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AFFIRMATIVE DEFENSE I
(Allegations in Complaint)

All allegations in Plaintiffs' Complaint are referenced and incorporated herein as if set forth fully, and they constitute a full defense to the Counterclaims.

AFFIRMATIVE DEFENSE II
(Failure to State a Claim)

The Association fails to state a claim against Plaintiffs that is proper and cognizable under applicable law.

AFFIRMATIVE DEFENSE III
(Waiver and Laches)

The Associations' claims are barred or limited by the doctrines of waiver and laches.

AFFIRMATIVE DEFENSE IV
(Failure to Mitigate)

The Association's claims and damages should be denied, barred, or reduced due to its failure to mitigate.

AFFIRMATIVE DEFENSE V
(Estoppel)

The Association's claims are barred by the doctrine of estoppel.

AFFIRMATIVE DEFENSE VI
(Attorney's fees and Costs)

Plaintiffs demand all attorneys fees and costs permitted by applicable law and by the governing documents.

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AFFIRMATIVE DEFENSE VII
(Ongoing Investigation and Reservation of Rights)

Plaintiffs have not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of the Association's allegations. Plaintiffs intend to act as best Plaintiffs can to inform Plaintiffs of the pertinent facts and prevailing circumstances surrounding any purported injury or damage to the Association as alleged in the Counterclaims and give notice of Plaintiffs' intent to assert any further affirmative defenses that the information gathering process may indicate is supported by fact and/or law.

WHEREFORE, having fully answered the Association's Amended Counterclaims and asserting the above affirmative defenses, the Plaintiffs pray that the Counterclaims be dismissed with prejudice and that the Plaintiffs be awarded the costs and reasonable fees associated with this matter and other such relief as the Court may deem just and proper.

[signature block appears on next page]

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Respectfully submitted,

FORD WALLACE THOMSON LLC

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Attorneys for Plaintiffs and Counterclaim Defendants Stanley Stroup as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, Peter Trager, and Vacation Inn, LLC

Charleston, South Carolina
February 8, 2023

CERTIFICATE OF SERVICE

The undersigned certifies that on February 8, 2023 this document was served by NEF on all attorneys of record:

J. Michael Jordan, Esq.
NEXSEN PRUET, LLC
Post Office Drawer 10648
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FORD WALLACE THOMSON LLC

s/ Ian Ford

ELECTRONICALLY FILED - 2024 Apr 15 2:43 PM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701655

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, *each both individually and derivatively*, Plaintiffs, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE No. 2021-CP-07-01655 **JOINT STIPULATIONS OF FACTS AND EVIDENCE FOR PURPOSES OF TRIAL**

NOW COME the parties, by and through their respective undersigned counsel, pursuant to Rule 43(k) of the South Carolina Rules of Civil Procedure, and hereby agree to the following stipulations for purposes of trial:

STIPULATIONS REGARDING FACTS NOT IN DISPUTE

The parties hereby agree that the following facts are not in dispute or controversy:

1. On June 25, 1970, the Developer Lighthouse Beach Company recorded the Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina and Provisions for the Sea Pines South Beach Owners' Association, Inc. (the "Declaration of Covenants and Restrictions"). (Exhibit. 1)
2. Plaintiff Stanley Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, as amended ("Stroup") is the owner of certain real property with a mailing address of 1460 Sound Villas, 253 South Sea Pines Drive, Hilton

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Head Island, SC 29928, by virtue of a deed recorded with the Beaufort County Register of Deeds in Book 3638 at Page 1271 on December 28, 2017. This property is subject to the Declaration of Covenants and Restrictions. (Ex. 1). Stroup and his wife originally purchased this property in 2002 as joint tenants.

3. Plaintiff Peter Trager ("Trager") owns a 4% interest in certain real property with a mailing address of 1853 Beachside Tennis, 247 South Sea Pines Drive, Hilton Head Island, SC 29928. This property is subject to the Declaration of Covenants and Restrictions. Trager and his wife originally took title on September 20, 1983, by deed recorded with the Beaufort County Register of Deeds in Book 379 at Page 540. Trager and his wife conveyed a 95% undivided interest in this property to Carolyn S. Trager, 4% undivided interest to Peter S. Trager, and 1% undivided interest to Jennifer Paige Trager Janco. This was recorded on August 13, 2007, and is located in Book 2608 on Page 2354, although the property is mistakenly identified as 1653 Beachside Tennis.
4. Plaintiff Vacation Inn, LLC ("Vacation Inn") is a South Carolina limited liability corporation that owns certain real property with a mailing address of 1732 Bluff Villas, 3 Braddock Bluff Drive, Hilton Head Island, SC 29928. This property is subject to the Declaration of Covenants and Restrictions. Vacation Inn took title on September 20, 2003, by deed recorded with the Beaufort County Register of Deeds in Book 1851 at Page 1673.
5. Vacation Inn owns numerous parcels within South Beach Marina Village and has done so since 1994.

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6. Robert A. Gossett Jr. ("Gossett") is managing member of Plaintiff Vacation Inn LLC.
7. Gossett is also the managing member of other entities, not a parties to this litigation, including Catwalk, LLC, LET, LLC, Lost Parrott, LLC, Moondog, LLC, and South Carolina Swimming Pool, Inc. These entities have owned properties subject to the Declaration of Covenants and Restrictions since 1984.
8. Defendant Sea Pines South Beach Owners' Association, Inc. (the "Association") is a non-profit corporation organized under the laws of the State of South Carolina, with its principal place of business in Hilton Head Island, South Carolina.
9. Defendant Association was formed in 1969 pursuant to its Certificate of Incorporation filed with the SC Secretary of State. (Exhibit 4).
10. Defendant Association is bound by the Declaration of Covenants and Restrictions and subject to its provisions. (Exhibit 1).
11. There are roughly 500 properties in the South Beach development subject to the terms of the Declaration of Covenants and Restriction.
12. Braddock Cove includes a navigable tidal creek that meanders for about a mile from Calibogue Sound along properties owned by some of the members of the Association, as well as other private properties not within the Association area.
13. For the demonstrative purpose of showing the area of Braddock Cove and other properties see maps and aerial photo attached as Exhibit 20.
14. Each Plaintiff is a member of the Association by virtue of ownership of real property subject to the Declaration of Covenants and Restrictions.

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15. A document entitled Modification of Covenants (the "Modification") was recorded in Beaufort County's deed book on October 22, 1985, and re-recorded on November 20, 1985 (to correct the Association's name). (Exhibit 3).
16. Plaintiff Trager, who owned his property that is subject to the Declaration of Covenants and Restrictions in 1985, did not vote in favor of the Modification.
17. An instrument entitled Quit-Claim Deed was recorded in Beaufort County's deed book on November 20, 1985, at Book 435, Page 529. (Exhibit 2).
18. The Association has never paid property taxes, does not own and has never owned any real property.
19. The South Island Dredging Association, Inc., ("SIDA") is a non-profit South Carolina corporation whose purpose includes to have certain waterways dredged, including the waterway called Braddock Cove.
20. For purposes of this lawsuit, "Braddock Cove Creek" and Braddock Cove are synonymous.
21. SIDA has numerous participating parties. SIDA has obtained certain regulatory permits over the years and has contracted with dredge contractors for certain maintenance dredging work. SIDA receives funds for the work based on negotiations among the participating parties, and such funding and allocations among those parties vary from dredge to dredge. Membership in SIDA is voluntary. Further, the participation in each dredge is voluntary on the part of each of participating party and has varied from dredge to dredge. (See Exhibit 6: SIDA Agreement).

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22. The minutes from the Association member meetings on November 23, 2001, September 28, 2013, and July 8, 2017, state that the quorum requirement was met and the members of the Association by seventy-five percent vote approved the special assessments to pay for a portion of the cost to dredge Braddock Cove. (See Exhibits 11-15).
23. The Association did not participate in SIDA's dredge of Braddock Cove Creek in 2023 (Exhibits 33). In 2023 when the Association did not participate in the dredging, the dredging did not continue to the end of Braddock Cove Creek but rather stopped at the Marina, which is owned by an entity controlled by Gossett.
24. In 2013, SIDA's contract for the dredge of Braddock Cove Creek was signed without agreement of the Association to participate. However, the Association members approved participation prior to the beginning of the dredge operations and funded a portion of SIDA's dredging costs.
25. Harbour Town Marina and South Beach Marina each have been independently, privately dredged without the support or participation of the Association or SIDA. When this has occurred the entirety of Braddock Cove was not dredged.
26. Other than channel markers, the property described as "Common Properties" in the 1985 Modification is owned by the State of South Carolina and has not been deeded to the Association.
27. The Association does not own and has never owned any channel markers.
28. In 2014, Vacation Inn, LLC, along with other corporate entity property owners owned or controlled by Gossett, filed a lawsuit against the Association claiming

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that the Declaration of Covenants and Restrictions did not apply to certain properties owned or controlled by Gossett. The trial court issued a ruling, which speaks for itself. The trial court's order was appealed. The South Carolina Court of Appeals affirmed the trial court judgment. The South Carolina Supreme Court did not accept certiorari. Some of the relevant documents in the case and appeal are attached. This Court may take judicial notice of all filings in the case, although facts may have changed since the documents were filed.

STIPULATIONS REGARDING
THE AUTHENTICITY AND ADMISSION OF DOCUMENTS

The parties hereby stipulate that the following numbered exhibits filed contemporaneously herewith are genuine and authentic and are admitted into evidence in this action. However, the parties reserve the right to argue to the Court about the weight to be given to any stipulated facts and documents. The parties agree that they will work together and not unreasonably withhold consent to the authenticity of additional documents deemed necessary for use at trial.

1. The *Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina, and Provisions for the Sea Pines South Beach Owners' Association, Inc.*
2. Quit-Claim Deed, recorded with the Beaufort County Register of Deeds in Book 435 at Page 529.
3. 1985 Modification of Covenants.
4. Certificate of Incorporation for South Beach Homeowners' Association, Inc.
5. Title to Real Estate (Stroup).

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6. SIDA Agreement.

7. Correspondence from the Department of the Army, including Permit and other materials.

8. South Beach Newsletter, December 2020.

9. South Beach Newsletter, Fall 2021.

10. *Declaration of Amendment to Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina and Provisions for the Sea Pines South Beach Owners' Association*, recorded by Lighthouse Beach Company with Beaufort County in Book 182 at Page 260.

11. Association Meeting Minutes, November 23, 2001.

12. Minutes of the Sea Pines South Beach Owners Association Special Meeting held on Sept. 28, 2013. SPSBOAI 73-74.

13. Sign In Sheet for Association Meeting September 28, 2013. SPSBOAI 00010

14. Vote composite for 2013 meeting, SPSBOAI 00092

15. Association Meeting Minutes, July 8, 2017.

16. Vote composite for 2017 meeting, SPSBOAI 00592-596.

17. Association Meeting Minutes, December 1, 2018.

18. Sign in sheet for December 1, 2018, Meeting. SPSBOAI 00568.

19. [Reserved]

20. Composite of arial views and maps of Braddock Cove area, for demonstration only.

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21. SPSBOA Board of Directors' Resolution for Special Assessment, August 23, 2013. SPSBOAI 79-80.

22. SPSBOA Board of Directors Resolution Affirming Membership Vote for Director, A Special Assessment for Dredging Braddock Cove Creek, and Change to the Association Quorum Requirement, July 8, 2017. SPSBOAI 585-586.

23. 2017 Special Meeting Sign In Sheet.

24. 2018 GEL Engineering, LLC Plats. Trager 65-70.

25. MGA Associates September 5, 2012 Essential Fish Habitat Assessment

26. Complaint in Catwalk, et al v. Sea Pines South Beach Owners' Association, Inc., Case Number 2014-CP-07-1435, Circuit Court of Beaufort County South Carolina.

27. Order on Plaintiffs' Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment filed January 22, 2016 in Case Number 2014-CP-07-1435 Circuit Court of Beaufort County South Carolina.

28. Judgment in a Civil Case filed March 18, 2016 in Case Number 2014-CP-07-1435 Circuit Court of Beaufort County South Carolina

29. Court of Appeals decision

30. Supreme Court order

31. Declaration of Covenants and Restrictions by Community Services Associates, Inc., recorded 1/21/2003

32. August 19, 2011 Joint Resolution of Boards of CSA and ASPPPO

33. South Beach (SPSBOA) Newsletter, Spring 2023

34. SPSBOA financials (SPSBOAI 118, 584, 651)

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35. South Beach Newsletter, Fall 2022.

36. *Declaration of Covenants and Agreement of 1988 for the Transfer of Properties, Reserved Rights, and Obligations of Hilton Head Liquidation Corp. to Community Services Associates, Inc.*, recorded with Beaufort County in Book 519 at Page 1161.

37. [Reserved]

38. Notice of Special Meeting of Sea Pines South Beach Owners Association for September 28, 2013.

39. Notice of Special Meeting of Sea Pines South Beach Owners Association for July 8, 2017.

40. Derivative Demand Letter to Sea Pines South Beach Owners Association Inc.'s Board of Directors, dated July 23, 2021.

So stipulated and agreed:

FORD WALLACE THOMSON LLC

s/ Ainsley F. Tillman
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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both individually and derivatively, Plaintiffs/Counterclaim Defendants, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant/Counterclaim Plaintiffs.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action no. 2021-CP-07-01655 **PLAINTIFFS' TRIAL BRIEF**

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This is an unusual case about an unusual property owners' association that owns no real property. The Association was organized by the developer in 1969, with the idea that it would one day own and maintain the community's common properties, such as parks and roadways. Oddly, however, the developer's plans changed, and it never conveyed any property to the Association. It has never owned real property and, since its formation in 1969, the Association has existed just to exist. Its only expenses are its own administration.

The core question in this case is whether this property owners association can lawfully assess its members to maintain property that is not owned by the Association or its members. Plaintiffs are members of the Association and assert that the governing documents only allow assessment for maintenance of common property owned by the Association and dedicated to the exclusive use of its members. In contrast, the Association asserts that it may assess its members to maintain property owned by the State of South Carolina. Specifically at issue is the levy of an assessment (with the risk to Plaintiffs of liens and foreclosure if they fail to pay) for the dredging of Braddock Cove, a navigable, tidal, and public waterway owned by the State of South Carolina.

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This is a legal question, and its answer hinges on the effect of a 1985 purported amendment to the Association's governing declaration and the interpretion of these provisions of its governing declaration:

> Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.
>
> . . .
>
> (c) "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties". The term "Common Properties" shall include any personal property acquired by the Association if said property is designated as "Common Property". All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties, subject to the fee schedules and operating rules adopted by the Association.

(Ex. 1 at Art. 1, Art. V) (highlighting added).

Plaintiffs assert two causes of action:

1. Breach of convenants in the nature of contract—Declaratory Judgment;
2. *Ultra vires* action—Injunction and Declaratory Relief.

(Compl. ¶¶ 46–55). Because this is a matter of strictly legal interpretation, the parties have stipulated to certain facts and exhibits, which were filed with the Court on April 15, 2024 (cited below as "Stip.")

Of note, the Association claims it has *no obligation* to dredge Braddock Cove, depending on the board's pleasure in a given year. For example, the Association's board chose not to participate in the 2023 dredge—and did not put the question to a vote of members. Even without the Association, the 2023 dredge of portions of

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Braddock Cove proceeded, as it has at other times when the Association's board refused to participate.

The issues to be determined in this trial are (1) whether Braddock Cove's boat channels, waterways and salt marsh open space areas are the Association's "common properties" that the Association's members may be assessed to support, (2) whether the Association may assess its members to pay dredging expenses, and (3) whether the Association may use its assessment power at all when it has no "common properties" to manage. The relevant facts are not disputed and the result turns on the unambiguous terms of the Association's governing documents.

There are numerous legal reasons that the Association's special assessments to dredge Braddock Cove are invalid, including:

A. **The Braddock Cove waterways were not deeded to the Association.** The Association may levy assessments *only* to pay to maintain common properties of the Association. The Braddock Cove waterways are not "common properties" because they are owned by the State of South Carolina and have not been deeded to the Association.

B. **The Braddock Cove waterways were not made subject to the Declaration.** Additional property may become subject to the the Association's governing declaration *only* by a supplementary declaration filed by the *owner* of the additional property. The State did not file a supplementary declaration to subject Braddock Cove waterways to the jurisdiction of the Association.

C. **The Association had no authority to amend the definition of "Common Properties."** The Association's governing declaration does not authorize amendments to change the definition of "Common Properties." The 1985 modification purporting to do so was unauthorized and did not become effective.

D. **The Association has no authority to levy dredging assessments.** Special assessments may be levied only to pay costs authorized by the Association's governing declaration. The declaration does not authorize special assessments for dredging property owned by strangers.

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E. Conditions precedent were not satisfied. The Association's governing declaration states that an amendment does not become effective unless (i) it is recorded 60 days before its effective date, and (ii) written notice of the proposed amendment is sent to South Beach property owners at least 30 days before the amendment is acted upon. The 1985 modification to include the Braddock Cove properties in the declaration's definition of "Common Properties" did not satisfy either of these conditions and did not become effective.

F. The claimed modification is unenforcable. The 1985 modification is unenforceable because its terms are unreasonable, indefinite, and against public policy.

G. The purported obligation does not run with the land. If the Declaration is interpreted to authorize dredging assessments, the covenant to pay them does not run with the land and does not bind any owner who acquired South Beach property after 1985.

In sum, the Association may levy assessments only to pay costs associated with the common properties that it actually owns. If the Braddock Cove waterways are not common properties, the Association owns no real property whatsoever, and the Association has no common properties to maintain. Without common properties to maintain, it has no authority to levy assessments.

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UNDISPUTED FACTS[1]

Defendant Sea Pines South Beach Property Owners' Association, Inc. (the "Association") was formed in 1969 for the single corporate purpose of "improving, maintaining and operating the common properties of the association" for the benefit of its members, property owners in the South Beach development.[2]

The authority and obligations of the Association and the rights and obligations of owners with respect to property in the South Beach development are stated in the Sea Pines Land Use Covenants filed in 1970 by the developer of South Beach, Lighthouse Beach Company (the "Declaration").[3] Plaintiffs are South Beach property owners[4] and as such are automatically members of the Association.[5]

The Declaration assigns to the Association the duty to manage "Common Properties" and the authority to levy assessments on Owners and their property to pay the costs of this management.[6] In return, the Declaration grants Owners

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[1] Plaintiff Stroup filed a Memorandum of Law in Support of Motion for Summary Judgment of Stanley S. Stroup, with exhibits, on February 17, 2024, and Memorandum of Law in Response to Defendant's Motion for Summary Judgment, with exhibits, on March 6, 2023, and Reply to Associations' Arguments on Summary Judgment and Stroup's Response to Certain Affirmative Defense Arguments by the Association, with exhibits, on April 7, 2023, and Notice of Filing Demonstratives, with demonstratives, on April 18, 2023, each of which is fully adopted by all Plaintiffs, and each of which is incorporated herein by reference as if set forth fully.

[2] Exhibit 4 at p. 1, Art. Fourth (Certificate of Incorporation).

[3] Exhibit 1.

[4] Stip. ¶¶ 2-4.

[5] Stip. ¶ 14; Exhibit 1, Art. III, Sec. 1.

[6] Exhibit 1, Third recital; *id.* Art. V, Sec. 2.

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an easement of enjoyment in the Common Properties that is appurtenant to their land[7] and the Association's commitment to use assessments "exclusively for the improvement, maintenance, and operation of the Common Properties" for their benefit.[8]

The Declaration defines "Common Properties":

> "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are *deeded* to the Association *and* designated in said deed as "*Common Properties*" . . . All Common Properties are to be *devoted to and intended for the common use and enjoyment of the owners of the Properties*, (subject to the fee schedules and operating rules adopted by the Association).[9]

The Declaration contemplated that the developer would someday deed certain properties to the Association as "Common Properties." But as it turned out, no properties were deeded to the Association by the developer and no properties have ever been deeded to the Association by anyone.

In 1985, the Association obtained a quitclaim deed from Sea Pines Plantation Company (the successor of Lighthouse Beach Company, the developer of South Beach) conveying any interest that Lighthouse Beach Company had in the "waterways, channel markers, salt marsh open space areas, and all of Grantor's right, title and interest, if any, in the navigable waterways of Braddock Cove" to the Association (the "1985 Quitclaim Deed").[10] Because the items described in the

[7] Exhibit 1, Art. IV, Sec. 1.

[8] Exhibit 1, Art. V, Sec. 2; Art. I, Sec. 1(c).

[9] Exhibit 1, Art. I, Sec. 1(c) (emphasis added).

[10] Exhibit 2.

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quitclaim deed are public waters, submerged land, and tidal land, they belong to the State of South Carolina. Thus, the 1985 Quitclaim deed conveyed no property at all.

The Declaration further provides that the owner of any property other than the developer who desires to add it to the plan of the covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.

No such property owner has filed a Supplementary Declaration adding its property to the jurisdiction of the Association. But, at the time the Association obtained the 1985 Quitclaim Deed, it filed a modification to the Declaration (the "1985 Modification") purporting to broaden the definition of "Common Properties" in the Declaration "to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, South Carolina" ("Braddock Cove").[11] The Association has stipulated that it owns no channel markers and that the Braddock Cove boat channels, waterways, and salt marsh open space areas are owned by the State of South Carolina.[12]

[11] Exhibit 3 at p. 1.

[12] Stip. ¶¶ 26, 27.

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After it obtained the 1985 Quitclaim Deed and recorded the 1985 Modification, the Association joined the South Island Dredging Association ("SIDA"), a voluntary association of Sea Pines property owners that organizes and contracts for dredging in the southern part of Sea Pines Plantation.[13] At times, the Association levied special assessments on its members to pay dredging costs to remove sediment from Braddock Cove in 1999, 2013, and 2018, and committed to pay a share of those dredging costs. Certain areas of Braddock Cove, which were dredged in the past, are shown on the 2013 dredging permit materials issued by the Army Corps of Engineers.[14]

However, the Association also contends that it has no obligation to participate in dredging of Braddock Cove, and it has refused to do so at times. For example, portions of Braddock Cove were dredged in 2023, but the Association refused to participate in that dredging.

In this lawsuit, Plaintiffs contend (*inter alia*) that the Association has no authority to impose special dredging assessments on Plaintiffs, because the Braddock Cove waterways were not deeded to the Association and therefore are not "Common Properties" as the term is used in the Association's certificate of incorporation and as it is defined in the Declaration. Further, the Braddock Cove waterways (including its boat channels, waterways, and salt marsh open space areas) were not added to the jurisdiction of the Association by a Supplementary

[13] Stip. ¶¶ 19, 21; *see also* Exhibit 6 (SIDA Agreement).

[14] Exhibit 7.

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Declaration by their owner, the State of South Carolina, as required by the Declaration. Plaintiffs contend that for these reasons the Braddock Cove waterways are not "Common Properties" that they may be assessed to support.

In addition, Plaintiffs contend that the Association had no authority to amend the definition of "Common Properties" in the Declaration, that the Declaration does not authorize special assessments for dredging, that the 1985 Modification did not become effective because the conditions precedent for the effectiveness of amendments were not satisfied and that the 1985 Modification is unenforceable under South Carolina law because it is unreasonable, indefinite, and against public policy.

The Association admits that does not and has never owned real property.[15] So if, as Plaintiffs contend, the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties," the Association has no "Common Properties" to manage. Without properties to manage, the Association has no authority to levy annual or other assessments. **Plaintiffs do not seek any remedy with respect to their past transactions with the Association, but only to prevent unauthorized assessments in the future.**

[15] Stip. ¶ 18.

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ARGUMENT

I. The Association may not levy special assessments to dredge Braddock Cove.

A. The boat channels, waterways, and salt marsh open space areas of Braddock Cove are not "Common Properties" because they are owned by the State of South Carolina and have not been deeded to the Association.

The Declaration states that assessments levied by the Association "shall be used exclusively for the improvement, maintenance, and operation of Common Properties . . . ."[16] "Common Properties" are defined to mean:

> those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties."[17]

Further,

> All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties (subject to the fee schedules and operating rules adopted by the Association).[18]

The Braddock Cove waterways and the salt marsh open space areas adjacent to Braddock Cove have not been deeded by their owner to the Association, nor have they been devoted to and intended for the common use and enjoyment of members of the Association. Although the 1985 Quitclaim Deed purported to convey these properties to the Association, it conveyed *nothing* because it was executed by the developer's successor, not by the owner of the properties.

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[16] Exhibit 1, Art. V, Sec. 2.

[17] Exhibit 1, Art. I, Sec. 1(c).

[18] *Id*.

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The Braddock Cove waterways are public waters owned by the State of South Carolina, and they are dedicated by the State to the use and enjoyment of all members of the public free of charge. They are not "Common Properties" of the Association. Yet, the Association incorrectly claims that it has the authority to assess all of its members from time to time in its discretion to pay for dredging of Braddock Cove as long as the assessment is approved by the vote of three quarters of a quorum of members.

A homeowners' association that can force dissenting members to support public property which the association has no obligation to maintain, in which the association has no property rights, and in which its members have no devoted property interest, is not a property owners' association at all—it is a fundraiser with a hammer. The Braddock Cove properties are not "Common Properties" and the Association may not assess Plaintiffs to dredge them.

B. Only the *owner* of additional property may subject it to the Declaration. The State of South Carolina did not subject its waterways to the Association's jurisdiction. The 1985 Modification purporting to make them the Association's Common Properties was therefore ineffective.

Although it admits it does not own any real property, the Association paradoxically contends that Braddock Cove was added to the Association's "Common Property." Article II, Section 2(b) states the requirements to add property to the terms of the Declaration:

> the *owner* of any property other than the [developer] who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions with respect to the

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> additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.[19]

In other words, if the owner of property wants it to become a part of the South Beach development, subject to "the jurisdiction of the Association," then the owner needs to manifest that intent in a recorded instrument. The State of South Carolina, the owner of Braddock Cove, did not file the 1985 Modification, which purports to add the State of South Carolina's boat channels, waterways, and the salt marsh open space areas abutting them to the jurisdiction of the Association.

Instead, the Association purported to subject these properties to its own jurisdiction simply by declaring them to be "Common Properties" in an agreement that it made with itself. The Association's theory—that it could unilaterally subject a stranger's property to its jurisdiction and assess Association members to support that property simply by declaring it to be "common property"—does not hold water.[20] Under this theory, a majority of Association members could force a dissenting minority to pay assessments to support any property that a three-quarters majority chose to support—Fort Sumter, the Brooklyn Bridge, the Atlantic Ocean—simply by declaring it to be one of the Association's "Common Properties." But only the *owner* is authorized to add property to the jurisdiction of the Association. The Association's unilateral attempt to do so by filing the 1985 Modification did not comply with the requirements of Article II, Section 2 (b) of

[19] Exhibit 1, Art. II, Sec. 2(b) (emphasis added).

[20] Pun intended.

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the Declaration and was ineffective. The Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties" and the Association may not assess its members to maintain them.

Article II, Section 2(b) and other terms in the Declaration are safeguards that prohibit amendments to the Declaration that would authorize assessments to support property in which the Association and its members have no property interest. Those safeguards are discussed below.

C. The Declaration does not authorize amendments to change the definition of "Common Properties" or the method by which properties become subject to the Declaration.

The 1985 Modification improperly sought to amend the Declaration's definition of "Common Properties." But by its plain terms, the Declaration limits the Association's amendment authority to amending "the covenants." The Association has no authority to amend the Declaration's definitions or the *methods* by which properties become subject to the terms of the Declaration. Article VIII, Section 1, states:

> *The covenants* may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change.[21]

(emphasis added). "The covenants" are an isolated subset of the articles in the Declaration, and they are defined to be the restrictions and affirmative obligations imposed on South Beach properties by the Declaration. "The covenants" are

[21] Exhibit 1, Art. VIII § 1.

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contained in Articles V, VI, and VII.[22] The Declaration's other articles define terms used throughout, and they deal with governance and property law relationships. The articles of the Declaration that define terms, provide for governance, and establish the property law relationships among the Association, the Owners, and property in the South Beach development are not "covenants," and the Association may not amend them.

The Declaration makes a clear distinction between "the covenants," which may be amended by the Association, and terms stating how property becomes subject to the Declaration, which may not be altered. The declaration paragraph following the recitals on page 1 of the Declaration first describes how property becomes subject to the covenants:

> [T]he Company [the developer] declares that the real property described in Article II, and such additions as may hereafter be made pursuant to Article II hereof is and shall be held, transferred, sold, conveyed, leased, occupied, and used . . .

and it then describes the restrictions to which that property is subject, and defines these restrictions as "the covenants":

> subject to the covenants, restrictions, conditions, easements, charges, assessments, affirmative obligations, and liens (sometimes referred to as "the covenants") hereinafter set forth . . . .[23]

This language unambiguously manifests the Declarant's intent that definitions, the description of the property subject to the Declaration, and the requirements to subject additional property to the terms of the Declaration are not "covenants."

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[22] Exhibit 1, Arts. VI & VII.

[23] Exhibit 1, page 1, "Now therefore" paragraph, following the recitals.

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Similarly, the text of the Declaration distinguishes "covenants" from the Declaration as a whole and from terms of the Declaration that are not "covenants." When it refers to the Declaration as a whole, the Declarant says so. For example, the first sentence of the Declaration refers to the entire document as "this Declaration."[24] The lead-in to the definitions in Article I states,

> The following words and terms, when used in this Declaration or any Supplemental Declaration (unless the context clearly shall indicate otherwise) shall have the following meanings . . . .[25]

The definition of "Properties" in Article I, Section 1(b) states,

> The "Properties" shall mean and refer to the Existing Property described in Article II hereof, and additions thereto, as are subject to this Declaration or any Supplemental Declaration under the provisions of Article II hereof.[26]

Article II, Section 2, which prescribes how additional property may become subject to the Declaration, makes clear that "covenants and restrictions" are distinct from the other terms of the Declaration. A Supplementary Declaration may amend covenants, but it may not amend the requirements for adding property to the plan of the Declaration. A Supplementary Declaration

> may contain such complementary additions and modifications of the covenants and restrictions contained in this Declaration as may be necessary or convenient in the judgment of [the developer] to reflect the different character, if any, of the added properties as are not inconsistent with the Plan of this Declaration.[27]

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[24] Exhibit 1, page 1.

[25] Exhibit 1, Art. 1, Sec. 1.

[26] Exhibit 1, Sec. 1(b).

[27] Exhibit 1, Art. II, Secs. 2(a) & 2(b).

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This provision authorizes necessary modifications to "covenants and restrictions" to be made in a Supplementary Declaration which adds property to the plan of the Declaration. It does not authorize amendments to the Declaration's requirements as to how the additional property becomes subject to the Declaration.

The distinction between "covenants" and terms that govern how properties become subject to a declaration was recognized in *Fairways Country Lakes Townhouse Ass'n v. Shenandoah Development Corp.*,[28] a case involving the authority to subject additional property to restrictive covenants. The court stated:

> In the present case, however we are not dealing with a covenant *per se*, but rather a reservation of a right to bring additional property within the terms of the covenants contained in the Fairways Declarations.[29]

The 1985 Modification to change the definition of "Common Properties" to include the Braddock Cove properties was not an authorized amendment of a "covenant," but rather an attempted alteration of a definition that is fundamental to the property rights of Owners, an alteration that the Association claims had the effects of adding property to the jurisdiction of the Association in a way not authorized by the Declaration, and authorizing dredging assessments. Because the 1985 Modification did not amend a "covenant," it was not authorized by the Declaration, and is invalid. The Braddock Cove properties are not "Common Properties."

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[28] *Fairways of County Lakes Townhouse Ass'n v. Shenandoah Development Corp.*, 447 N.E.2d 1367, 113 Ill.App.3d 932, 69 Ill.Dec. 680 (Ill. App. 1978).

[29] *Id.*, 447 N.E.2d at 1369.

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D. The Declaration does not authorize special assessments for dredging.

The Association claims that the 1985 Modification's purported amendment of the Declaration to include the Braddock Cove waterways in the definition of "Common Properties" had the additional effect of authorizing special assessments for dredging. But the 1985 Modification did not purport to change Article V which prescribes and limits the Association's assessment authority.

Article V, Section 4 of the Declaration states that special assessments may be levied,

> for the purpose of defraying, in whole or in part, the cost of any *construction* or *reconstruction*, *unexpected repair* or *replacement* of a described capital improvement upon the *Common Properties* . . . or *addition* to the *Common Properties*.[30]

Restrictive covenants are strictly construed and this itemized list prohibits the Association from levying special assessments for other purposes. "[T]he maxim 'Expressio unius est exclusio alterius' applies here: 'When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.'"[31]

"'Dredging' is the removal of sediments and debris from the bottom of lakes, rivers, harbors, and other water bodies."[32] In contrast, the activities for which special assessments may be levied relate to activities that are conducted on

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[30] Exhibit 1, Art. V, Sec. 4 (emphasis added)

[31] *Evins v. Richland County Historic Preservation Com'n*, 341 S.C. 15, 532 S.E.2d 876 (2000), *quoting Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447, 448 (1933).

[32] NOAA, *What is Dredging?,* National Ocean Service Website https://oceanservice.noaa.gov/facts/dredging.html, 03/07/2021.

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dry land. Dredging is not among them. None of the specified processes for which special assessments may be levied ("*construction* or *reconstruction*, *unexpected repair* or *replacement*" or "*addition* to the Common Properties") include dredging (emphasis added).

First, "construction" means "the process, art, or manner of building something."[33] Building something is not the removal of something (*i.e.*, dredging).

Second, "replacement" in the context of the Declaration means "to put something new in the place of."[34] Dredging removes something. It does not replace anything.

Third, "repair" means "1 a.: to restore by replacing a part or putting together what is torn or broken: FIX b.: to restore to a sound or healthy state: RENEW."[35] Although it may be argued that "dredging" is a type of repair that "renews" a waterway, the Declaration's authorization of special assessments for repairs is limited to "unexpected repairs." Dredging is not unexpected. It is a process required periodically to remove sediment from tidal waterways. The Association recognized this in its Fall 2021 South Beach Newsletter, which stated:

> To maintain adequate depths for boat navigability in Braddock Creek and its marinas they must be dredged periodically to remove pluff mud, which naturally moves in with our tides. The next dredge will be next year, the fall of 2022. The South Island Dredging Association (SIDA), of which our association is a founding member, will initiate the dredge by soliciting bids from dredge contractors,

[33] "Construction," *Merriam-Webster.com Dictionary,* 02/21/2022.

[34] "Replacement," *Merriam-Webster.com Dictionary,* 02/21/2022.

[35] "Repair," *Merriam-Webster.com Dictionary,* 02/21/2022.

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> coordinate with federal and state regulators and develop a funding plan.[36]

Indisputably, dredging is not an "unexpected repair."

Fourth, "addition" in the context of the Declaration is "a part added (as to a building or residential)."[37] Dredging removes sediment and debris. It adds nothing.

In summary, restrictive covenants must be strictly construed with all doubts resolved against the restriction.[38] "Dredging" is not "construction," "replacement," "unexpected repair," or "addition." The Declaration does not authorize special assessments to pay for dredging.

E. The Declaration states that amendments do not become effective unless (i) they are recorded at least 60 days before their effective date, and (ii) Association members are given at least 30 days' notice of proposed amendments before acting on them. Neither of these conditions was satisfied with respect to the 1985 Modification and therefore it did not become effective.

Real property restrictive covenants must be amended according to their procedure, or the resulting amendment is without effect.[39] In *Queen's Grant II v. Greenwood Development Corp.*,[40] the South Carolina Court of Appeals held that to exercise a reserved right to amend restrictive covenants running with the land, a

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[36] Exhibit 9, *South Beach Newsletter, Fall 2021* at page 7.

[37] "Addition", *Merriam-Webster.com Dictionary,* 02/21/2022.

[38] *Sea Pines Plantation v. Wells, supra*.

[39] *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) (amendment provisions must be strictly followed or resulting amendment is unenforceable), *citing Brown v. Bass*, 277 S.E.2d 480, 276 S.C. 211 (1981).

[40] 368 S.C. 342, 628 S.E. 2d 902 (Ct. App. 2006)

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developer "must strictly comply with the amendment procedure as set forth in the declaration of covenants…."[41] Here, the Association as the developer's designee purported to amend the Declaration,[42] but it failed to strictly comply with the amendment requirements of the Declaration. The 1985 Modification was therefore ineffective, under its own plain requirements and the law of South Carolina.

1. The 1985 Modification was not recorded at least 60 days before its effective date and therefore it did not become effective.

To become effective, amendments to the Declaration must satisfy the two conditions precedent stated in Article VIII. The first condition is,

> The covenants may be amended at any time if three-fourths (3/4) of the vote of a duly called meeting approves the change. Provided, however, that no such agreement to change shall be effective unless made and recorded sixty (60) days in advance of the effective date of such change . . .[43]

The 1985 Modification did not satisfy this condition to amendment. It was signed and "made" October 18, 1985, recorded October 22, 1985, and purported to amend the Declaration "herewith."[44]

Express conditions to the effectiveness of an agreement are strictly construed and literally applied. If the terms of the condition are not strictly met, the agreement is not effective—it does not matter that the purpose of the condition is satisfied by a means that does not comply literally with the requirements of the

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[41] *Id.* at 907.

[42] Exhibit 3, recitals.

[43] Exhibit 1, Art. VIII.

[44] Exhibit 3.

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condition, or that a party has substantially complied with the condition, or that the result under the agreement would have been the same as it would have been had the condition been satisfied.

For example, *Oppenheimer & Co. Inc. v. Oppenheimer, Appel, Dixon & Co.*[45] involved an agreement that a sublease would not become effective "unless and until" a certain written consent was delivered before a specified deadline. Although an oral consent was given within the specified time, the required written consent was not delivered until after the deadline. The court held that the sublease did not become effective, stating:

> the critical language of the [parties' agreement] establishes an express condition precedent rather than a promise, as the parties employed unmistakable language of condition ("if", "unless and until"). There is no doubt of the parties' intent and no occasion for interpreting the terms of the letter agreement other than as written.
>
> . . .
>
> If the parties "have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event."[46]

South Carolina law is in accord with the *Oppenheimer* case. *Coastal Seafood Co. v. Alcoa*[47] involved an agreement between Alcoa, the owner of Dataw Island, and Coastal Seafood, the owner of a lease to harvest oysters in the beds surrounding the island. The agreement allowed residents of the island to harvest oysters from

[45] 636 N.Y.S.2d 734, 86 N.Y.2d 685, 660 N.E.2d 415 (N.Y. 1995).

[46] *Id.* at 737-738, *quoting* Restatement (Second) of Contracts § 237, comment d, at 220; *also citing* 2 Farnsworth, *Contracts* § 8.12, p. 415 (2d ed. 1990).

[47] 381 S.E.2d 502, 298 S.C. 466 (Ct. App. 1989).

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the leased beds and stated, "this agreement shall terminate upon . . . COASTAL['s] not having the oyster leases from the State of South Carolina for all the oyster beds surrounding Dataw Island."[48]

Coastal Seafood admitted that it no longer had leases for the north side of the island, but argued that the termination provision did not apply because "there were very few oyster beds on the north side of the island" and that it had substantially complied with the agreement. The court rejected Coastal Seafood's argument, stating:

> Where a contract, by its express provisions, makes strict compliance essential, substantial performance is not sufficient. [citation omitted] The duty of Alcoa under the contract is expressly conditional on Coastal Seafood's having the lease for all the oyster beds surrounding the island. The word "all" as used in the contract, obviously does not mean "some of", or even "the great majority of." "[T]he doctrine of substantial performance does not apply to express conditions." *Aherns v. McDaniel*, 287 S.C. 63,66, 336 S.E. 2d 505,507 (Ct. App. 1985).

Likewise here, the word "unless" in the Declaration is unmistakably a word of condition. But unlike in *Coastal Seafood*, the condition here is not a condition subsequent that allows termination of an existing contractual obligation upon failure of the condition, but a condition precedent that must be satisfied before the contractual obligation can exist at all. That the condition was not satisfied in this case is apparent from the face of the 1985 Modification.[49]

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[48] *Id.* at 503.

[49] Exhibit 3.

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The 1985 Modification was signed by all signatories on October 18, 1985. Its first sentence states that it is "made" October 18, 1985. Both the recitals and the text of the modification itself say that the Declaration is "herewith amended." The words "herewith amended" without qualification are words of immediate effect.

Compliance with the first condition precedent required by the Declaration would have been as easy as it is necessary. In 1971, the covenants in the Declaration were correctly amended by Lighthouse Beach Company, the developer of South Beach. The 1971 Amendment satisfied the condition precedent with a single sentence:

> Said amendments shall become effective sixty (60) days, from the date this Declaration of Amendment is recorded in the Office of the Clerk of Court in Beaufort County, South Carolina.[50]

The 1971 Amendment became effective. The 1985 Modification did not.

2. Association members were not given at least 30 days' written notice of the 1985 Modification before acting to approve it and therefore it did not become effective.

The second condition precedent in Article VIII, Section 1 of the Declaration states that an agreement to amend does not become effective

> unless written notice of the proposed agreement is sent to [members of the Association] at least thirty (30) days in advance of any action taken.[51]

The text of the 1985 Modification itself shows that this mandatory condition precedent to effectiveness was not satisfied. The language purportedly added to

[50] Exhibit 10.

[51] Exhibit 1, p. 14.

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the Declaration by the 1985 Modification to show and describe the Braddock Cove properties is incorporated by reference from the 1985 Quitclaim Deed. The 1985 Modification purports to amend the Declaration to state:

> Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985 . . . . [52]

The language purportedly incorporated in the Declaration was incorporated by reference from a quitclaim deed executed July 15, 1985. The quitclaim deed referred to was executed 19 days before Association members voted on August 3, 1985, to incorporate its language in the 1985 Modification. It is not possible to give 30 days' advance notice of a meeting to approve an amendment that incorporates language from a document that did not exist until 19 days before the meeting was held. The face of the 1985 Modification shows that the 30-day notice condition precedent was not satisfied because the Declaration's express conditions precedent for amendment were not satisfied. Therefore, the 1985 Modification did not become effective.

The Association's failure to satisfy the Declaration's condition precedent that at least 30 days' prior written notice is required for an amendment to become effective also failed to satisfy a condition imposed by South Carolina law that "the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law . . .

[52] Exhibit 3, p. 1.

."[53] Giving 19 days' notice when at least 30 days' notice is required is not strict compliance with the Declaration and does not satisfy a condition for effectiveness imposed by *Queen's Grant II*.[54]

The court in *Queen's Grant II* also conditioned the effectiveness of covenant amendments on satisfying the requirements that "the new or amended covenants must not be unreasonable, indefinite, or contravene public policy." These requirements are discussed next.

F. If the 1985 Modification is interpreted to authorize assessments to dredge Braddock Cove, it is invalid and unenforceable because it is unreasonable, indefinite, and contravenes public policy.

The *Queen's Grant II* court stated that amendments to restrictive covenants are unenforceable if they are "unreasonable, indefinite, or contravene public policy."[55] If the 1985 Modification is interpreted to authorize assessments to dredge Braddock Cove's boat channels and waterways, it is ineffective and unenforceable under *Queen's Grant II*.

1. Unreasonable

The 1985 Modification is unreasonable because it is inconsistent with the plan of administration established by the Declaration. The Declaration established a plan based on reciprocal contractual and property law rights and obligations

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53 *Queen's Grant II v. Greenwood Development*, 628 S.E.2d 902, 907, 368 S.C. 342 (S.C. App. 2006) (emphasis added).

54 In addition, the Modification falsly states that that it is executed "pursuant to the unanimous vote of the members of the Assocation." (underlining added). It is undisputed that Plaintiff Trager "did not vote in favor of the Modification." Stip. ¶ 16.

55 *Queen Grant II*, 628 S.E.2d at 907.

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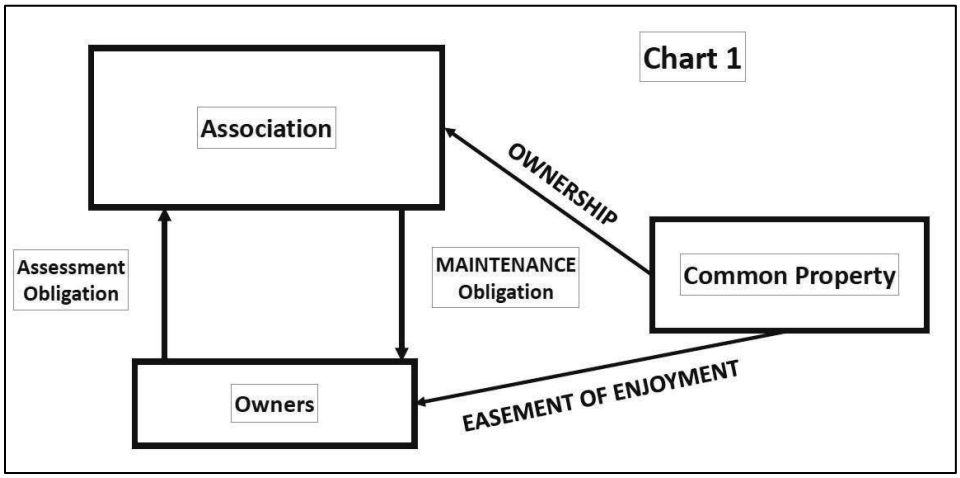
between the Association and Owners with respect to the Common Properties. The Declaration provided that the Association would own and operate the Common Properties "for the common use and enjoyment of the owners of the Properties"[56] and authorized the Association to assess Owners to pay the expenses of operating these properties.[57]

In return, Owners were granted easements of enjoyment in the Common Properties that were appurtenant to their land[58] and the Association's commitment to operate the Common Properties.[59]

The reciprocal contract and property law rights and obligations of the Association and Owners established by the Declaration are shown on Chart 1 below:



[56] Exhibit 1, Art. I § 1(c).

[57] Exhibit 1, Art. V § 1.

[58] Exhibit 1, Art. IV § 1.

[59] Exhibit 1, Art. V § 2.

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The reciprocal property and contract law relationships between the Association and Owners established by the Declaration with respect to Common Properties and depicted in Chart 1 disappear under the Association's reading of the 1985 Modification. Under its reading, the Association may levy special assessments to pay for dredging on property it does not own, property it has no obligation to dredge except the obligation it voluntarily assumes from time to time by participating in the South Island Dredging Association's dredging projects, and property that is not devoted to the "common use and enjoyment" of Owners.[60] Owners' rights to enjoy Braddock Cove derive from the State of South Carolina, not the Association, and are rights belonging to all members of the public. Yet, the Association claims the authority under the 1985 Modification to assess all of its members to dredge Braddock Cove as long as at least three quarters of a quorum of its members approve the project.

The contractual and property law rights and obligations of the Association and Owners with respect to the Braddock Cove waterways under the Association's interpretation of the 1985 Modification are shown on Chart 2 below.

[60] Exhibit 1, Art. I § 1(c).

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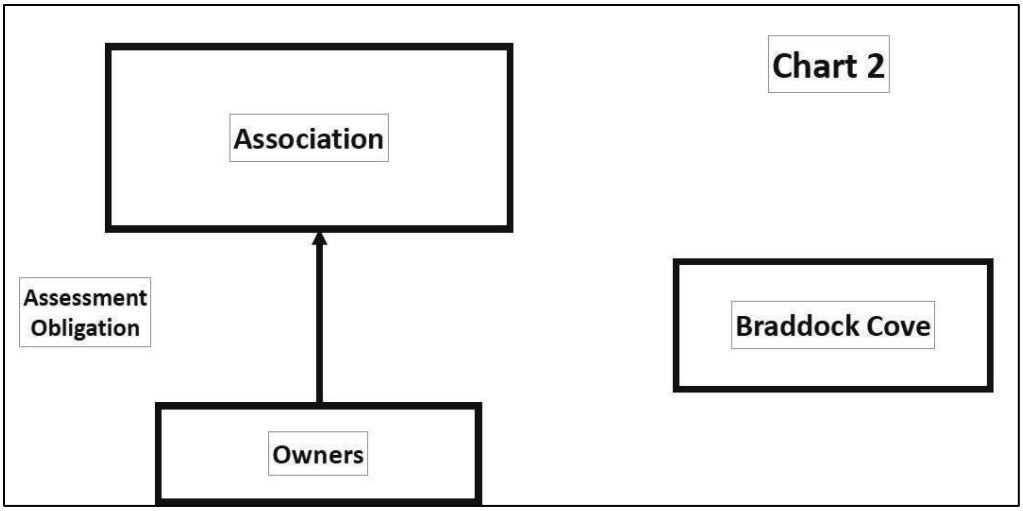

The Association's reading of the 1985 Modification wrongly eliminates with respect to Braddock Cove all contractual and property law connections the Declaration establishes between the land burdened and the land benefitted by assessments, except the Owners' obligation to pay dredging assessments. There is no privity of estate between property of the Association and Braddock Cove's boat channels and waterways.

Under the Association's reading, the "covenant" to pay dredging assessments is not a real covenant at all. It is an obligation imposed on dissenting property owners by the Association to pay to dredge property in which Owners have no devoted legal interest. An amendment that eviscerates the rights of Owners in Common Properties established by the Declaration is unreasonable.

The problem is, as the court stated in *Armstrong v. Ledges Homeowners' Association,*[61]

> Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of

[61] *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 87, 360 N.C. 547 (N.C. 2006).

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> amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain.

The amendment at issue in the *Armstrong* case would have enlarged substantially the list of activities that homeowners could be assessed to support. The court held that an amendment that extended the association's assessment authority far beyond that contemplated by the original declaration was unreasonable and unenforceable, concluding, "every amendment must be *reasonable* in light of the contracting parties' original intent."[62]

Here, the original intent was to create a plan of real covenants under which South Beach property owners shared the responsibility to pay to maintain common properties in which they shared ownership. The Association's interpretation of the 1985 Modification would eliminate the shared-ownership requirement, but extend the shared-obligation requirement by allowing the Association to force dissenting Owners to pay to support the property of a stranger. The 1985 Modification as interpreted by the Association drastically changes the original deal and is unreasonable and unenforceable. Indeed, the Declaration itself prohibits unreasonable amendments to its covenants. Article II, Sections 2(a) and (b) both state that a Supplementary Declaration adding property

[62] *Id.*(emphasis in original).

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to the plan of the Declaration may modify covenants, but only "as are not inconsistent with the Plan of this Declaration."[63]

2. Indefinite

The second requirement for effectiveness of an amendment to a restrictive covenant stated by *Queen's Grant II* court is that the amendment must not be indefinite.

Affirmative covenants are unenforceable "unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application."[64] It is the job of courts to interpret standards established by the parties, not to create standards for the parties.

The 1985 Modification creates categories of property, water, tideland, and submerged land, different from the category created by the Declaration—dry land. The 1985 Modification purported to amend the definition of "Common Properties" to include the Braddock Cove waterways. But it did not add anything to the assessment terms of the Declaration to state the Association's rights and obligations with respect to the waterways. As interpreted by the Association, the 1985 Modification imposed no obligation to maintain Braddock Cove, but authorized it to assess Owners for any amount, allocated in any way it chose to help pay for maintenance dredging. In the Association's view, the amendment of a definition eliminated the requirements that "Common Properties" must be

[63] Exhibit 1, Art. II §§ 2(a)–(b).

[64] *Beech Mountain Prop. Owners' Ass'n v. Seifert*, 269 S.E.2d 178, 183, 48 N.C. App. 286, 294 (1980).

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properties deeded to the Association and had the additional effect of authorizing the Association to levy assessments to maintenance dredge Braddock Cove at its option, for any amount, and on any basis three quarters of its members approved. The Association's rights and obligations with respect to Braddock Cove are unstated and consequently, its assessments for maintenance dredging are unenforceable. As the court stated in *Lovering v. Seabrook Island Property Owners' Association*,[65]

> In order to constitute an enforceable power of assessment in the Association, an assessment provision must: (1) express a sufficiently definite standard by which to measure liability for the assessment; (2) describe with particularity the property to be maintained; and (3) provide an ascertainable standard by which the purpose for which the assessment is levied can be objectively determined. . . . A standard such as "any other thing necessary or desirable in the opinion of the Board of Directors" is too vague to be enforceable.

The Association has no obligations to Owners or third parties with respect to the Braddock Cove unless it chooses from time to time to assume them. The Association has no right to regulate the use of Braddock Cove unless it is granted rights by the State of South Carolina. The 1985 Modification gives no guidance as to obligations the Association may assume or the rights it may seek with respect to the Braddock Cove waterways.

And although the property of some Owners borders Braddock Cove, the property of most does not. The 1985 Modification provides no objective standard for allocating the burden of dredging assessments among Owners and, indeed,

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[65] 344 S.E.2d 862, 866, 289 S.C. 77 (S.C. App. 1986), *aff'd as modified*, 352 S.E.2d 707, 352 S.E.2d 707, 291 S.C. 201 (S.C. 1987).

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provides no objective standard for determining whether the Association will participate in maintenance dredging at all.

For example, in 2023 the Association's board decided not to participate the maintenance dredging of Braddock Cove for purely subjective reasons. As it said in its Fall 2022 Newsletter to Owners:

> This Board did not feel that residential members should be required to contribute the same percentages as the commercial members which obtain significantly greater financial benefit from the navigable waterway of Braddock Cove. While we certainly recognize that the dredge of Braddock Cove is a benefit to all of South Beach, and indeed to all of Sea Pines and the Town of Hilton Head, we felt that the residential members were being asked to pay a disproportionate amount, relative to the benefit received. As a result, Braddock Cove will largely be dredged but, as noted, the Upper Creek will not be included. . . .[66]

Decisions based on feelings are not decisions based on an ascertainable standard. As the court stated in *Beech Mountain Property Owners' Ass'n v. Seifert,*[67]

> Obviously, a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard.

The 1985 Modification purported to amend a definition. If it is determined to have also added a covenant to pay maintenance dredging assessments at any time, in any amount, and allocated in any manner that three quarters of a quorum of its members approve, it is indefinite and unenforceable.

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[66] Exhibit 35, p. 4 (South Beach Newsletter, Fall 2022).

[67] 269 S.E.2d at 183.

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3. Public policy

The third requirement for the effectiveness of an amendment of a restrictive stated by the *Queen's Grant II* court is that it must not violate public policy.

a. Touch and concern

In the preamble to S.C. Code § 27-1-70, a statute that invalidated restrictive covenants that imposed transfer fees on the sale of real property, the South Carolina General Assembly affirmed the public policy of the State concerning restrictions on the transfer of property, stating:

> the public policy of this State favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the property . . . .[68]

The assessment obligation to dredge Braddock Cove that the Association contends is imposed by the 1985 Modification does not touch and concern Owners' land because no legal interest in Braddock Cove—the property benefitted by the assessment—is attached to Owners' property. Burdens that do not touch and concern the burdened land are against the public policy of South Carolina. *See* Section ___, *infra* (discussing failure to touch and concern land).

b. Real covenant

A real covenant by definition is an agreement between landowners respecting the use of their land, burdening the land of one, and benefitting the land of the other.[69] South Carolina appellate cases dealing with real covenants have

[68] S.C. Code § 27-1-70(B)(1) (2024).

[69] 5 *Powell on Real Property* ¶ 670.

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involved an exchange of promises between the owner of the land burdened by the promise and the owner of the land benefitted by the promise, or their predecessors in title.[70] In this case, the Declaration is built on real covenants.[71]

A real covenant may be enforced only by the owner of the dominant estate. As the court stated in *Stegall v. Housing Authority,*

> One who seeks to enforce a restrictive covenant "must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder." [72]

Here, there is no real covenant at all because there is no agreement between the Association as representative of the owners of the land burdened by the covenant, and the State of South Carolina, the owner of the land benefitted by the covenant. The State of South Carolina has no statutory, contractual, or property law right to require the Association to dredge Braddock Cove, and the Association has no obligation to the State to dredge Braddock Cove. The Association's obligation to dredge is not attached to the property benefitted by the dredging in any way. Instead, it is simply a contractual obligation to a dredging company that Association has—sometimes—assumed voluntarily.

Although packaged in the container of a property owners' association and clothed in the language of real covenants, the 1985 Modification as interpreted by

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[70] *See, e.g., Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (S.C. App. 2015) ("Restrictive covenants, sometimes referred to as 'real covenants,' are agreements to do, or refrain from doing, certain things with respect to real property.") (internal quotations omitted).

[71] Exhibit 1, Art. I § 1(c); Art. II §§ 1 & 2; Art. IV § 1; Art. V §§ 1 & 2; Art. VIII § 1.

[72] *Stegall v. Housing Authority of City of Charlotte*, 178 S.E.2d 824, 829, 278 N.C. 95 (N.C. 1971).

the Association is nothing of the sort. Here, the Association is not acting as the owner of a dominant estate to enforce an assessment obligation against servient estates under a real covenant, but as a fundraiser to raise money to maintenance dredge Braddock Cove. It is using the coercive authority of a property owners' association, in the guise of enforcing a real covenant, to force dissenting Owners to contribute to a cause three quarters of a quorum of the Association's members sometimes decide to support.

When a property owners' association ceases to use its assessment authority to support property in which it and its members have a common property interest, it ceases to be a property owners' association and becomes a fundraiser for a cause. The Association may not use assessment authority based on shared interests in property to coerce dissenting property owners to support its chosen cause.

Legally, paying dredging costs is a gratuitous act by the Association for the benefit of the land of a stranger. Under the Association's incorrect interpretation of the 1985 Modification, the coercive authority of the Association can be used not only to enforce real covenants, but also to force dissenting members to contribute to a cause supported by a super-majority of members simply because the dissenters happen to own property in the same development.

Any group of South Beach property owners who wish to support the maintenance dredging of Braddock Cove may, of course, choose to do so. But they may not use the coercive authority of the Association to force their disagreeing neighbors to join in their generosity.

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c. Public property

The Braddock Cove waterways are public property. As the court stated in *McQueen v. South Carolina Coastal Council,*[73]

> Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State.

And the water itself is public property. Article XIV, Section 4 of the South Carolina Constitution states,

> All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed . . . .[74]

All members of the public are entitled to use and enjoy public waters. Members of the Association have no special rights to use Braddock Cove. The rights they have with respect to Braddock Cove are derived from the State of South Carolina, not the Association. The Association has no obligation to dredge Braddock Cove. Its occasional decisions to dredge are gratuitous. Yet, under the Association's improper reading of the 1985 Modification, with the approval of at least three quarters of a quorum of its members, it may impose dredging assessments on the dissenting minority and their property.

Under the Association's improper reading, it could assess dissenting Owner's to pay to support public schools, public highways, post offices, and other public property within or without the borders of its community. The Association

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[73] *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116 (S.C. 2003).

[74] S.C. Const. art. XIV § 4.

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is a private organization, established for the private purpose of managing private property for the benefit of private property owners. Its claim that it can amend a definition in the Declaration to tax dissenting Owners to maintain public property—property in which it has no legal interest, property which it has no obligation to support, and property in which its members have no special rights—is unreasonable, against public policy, and unenforceable.

G. If the 1985 Modification is interpreted to authorize the Association to dredge land in which its members have no devoted property interest, the covenant is personal and does not touch and concern their land.

A covenant runs with the land only if it touches and concerns the land. Here, if the 1985 Modification is interpreted to authorize assessments to dredge Braddock Cove, it does not touch and concern Owners' land because there is no property law connection between their land and the boat channels and waterways benefitted by maintenance dredging assessments.

The leading South Carolina case on the touch and concern requirement is *Epting v. Lexington Water Power Co.*[75] The covenant in *Epting* obligated the grantee and his successors and assigns to remove or pay for the removal of buildings from the land purchased by the grantee to other land owned by the grantor and to furnish electricity to grantor once the buildings were moved. The grantor's successor in title sued the grantee's successor in title to enforce these obligations.

[75] *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66 (S.C. 1935).

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The court held that the grantee's successor was not bound by the covenants, which were purely personal and did not touch and concern the grantee's land.

The court summarized the law:

> In all of the cases . . . the decisions are to the effect that the covenant must relate to the reality demised, having for its object something annexed to or inherent in, or connected with the land . . . Covenants which are personal and collateral to the land do not run with the land.[76]

If the 1985 Modification is interpreted to authorize the Association to assess its members to dredge Braddock Cove, it is a covenant to pay money that is not for "something annexed to or inherent in, or connected with" Owners' land. Instead, the assessment is for dredging the property of a stranger (the State of South Carolina), land which has no legal connection with the land burdened by the assessment.

The seminal American "touch and concern" case is *Neponsit Property Owners' Ass'n. v. Emigrant Industrial Savings Bank.*[77] In that case, the New York Court of Appeals considered whether a covenant in a deed requiring homeowners to pay assessments to maintain common property in a real estate development ran with their land. The covenant in the *Neponsit* case stated in relevant part,

> property conveyed by this deed [developer to homeowner] shall be subject to an annual charge. . . . Such charge . . . shall be devoted to the maintenance of the roads, paths, parks, beach, sewers and such other public purposes as shall be from time to time determined [by the developer], its successors and assigns.[78]

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[76] *Epting*, 181 S.E. at 71, 177 S.C. at 320.

[77] *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

[78] *Id.*, 278 N.Y. 253–254.

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The court noted that under the English rule followed at the time, the covenant would not run with the land because it required the promisor to perform an affirmative act. However, rather than automatically applying the English rule, the court adopted a test based on the effect of the covenant on legal interests in land. The court stated:

> It has been suggested that a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land.[79]

The question to be answered, said the court, is, "Does the covenant impose, on the one hand, a burden upon an interest in land, which on the other hand increases the value of a different interest in the same or related land?"[80]

In *Neponsit*, the burden on the owner of the burdened land to pay maintenance assessments was accompanied by the right of that owner to use the land that benefitted from the assessment, not as a member of the general public or a taxpayer, but as the owner of a real property interest—an easement—in the benefitted land. As the court stated:

> it seems clear that the covenant may properly be said to touch and concern the land of the defendant and its burden should run with the land. True, it calls for payment of a sum of money to be expended for "public purposes" upon land other than the land conveyed by [the original grantor] to plaintiff's predecessor in title. By that conveyance the grantee, however, obtained not only title to particular lots, but an easement or right of common enjoyment with

[79] *Id.*, 278 N.Y. at 257.

[80] *Id.*, 278 N.Y. at 258.

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> other property owners in roads, beaches, public parks or spaces and improvements in the same tract.
>
> . . .
>
> In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant that the burden of paying the cost should be inseparably attached to the land which enjoys the benefit.[81]

In *Neponsit*, the owners of the property burdened by the assessment had a property interest—an exclusive easement of enjoyment—that connected the burdened land to the land benefitted by the assessment. This shared-interest property law connection between the burdened and benefitted land is required for a covenant to touch and concern land.

The facts in *Midsouth Golf LLC v. Fairfield Habourside II Condominium Association, Inc.*[82] are analogous to the facts in this case. *Midsouth Golf* involved the levy of a "Recreational Amenities Charge" on subdivision homeowners. The property supported by the amenity charge was owned by a third party. Homeowners had no property interest in the recreational amenities, but had a revocable license to use the amenities on terms set by the separate owner of that property. Homeowners were also subject to assessments to support common properties owned by the homeowners' association in which homeowners had an easement of use that was appurtenant to their lots.

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[81] *Id.*, 278 N.Y. at 259–260.

[82] *Midsouth Golf v. Fairfield Harbourside*, 652 S.E.2d 378, 187 N.C. App. 22 (2007)

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The court held that assessments to pay the recreational amenity charge did not touch and concern the homeowners' land because no real property interest in the amenities was attached to their lots. On the other hand, the obligation to pay assessments to support common properties did touch and concern their land because an easement to use the common properties was attached to and appurtenant to their lots. The *Midsouth Golf* court, citing *Neponsit*, stated,

> In *Neponsit*, the fact that the grantees of lots within the development received an easement in the common areas and amenities financed by those fees was central to the Court's holding that the covenant to pay a fee touched and concerned the land. In contrast, by virtue of the unique set of covenants at issue in the present case, Defendants do not have any easement rights in the recreational amenities financed by the recreational amenity charge; they only have easement rights in the common areas, or parks, within Fairfield Harbour. . . . Therefore, Defendants merely have a revocable license to use the recreational amenities. We find this to be a key distinction, and hold that in the present case, the covenant to pay amenity fees did not touch and concern Defendants' properties.[83]

In this case, the Association has no property interest in Braddock Cove and no authority to limit or otherwise regulate its use. Owners have no easement or other devoted property interest in these waterways and no right to use them except rights they enjoy as members of the general public along with other citizens of South Carolina and the United States. The obligation to pay to dredge Braddock Cove Creek does not touch and concern Owners' land.

Property owners' associations work because covenants to pay assessments run with the property owners' land and bind successive purchasers from the

[83] *Midsouth Golf*, 652 S.E.2d at 386–387 (internal citations omitted; underlining added).

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original grantees. If a covenant does not run with the land it is the personal obligation of only the original grantee and does not bind successors. In this case, the purported covenant to pay special dredging assessments was added to the Declaration in 1985. South Beach properties have changed hands thousands of times since 1985. If the covenant to pay maintenance dredging assessments did not run with the original grantees' land, it was personal and virtually no current South Beach property owner is bound by it. If the 1985 Modification is interpreted to mean that the Braddock Cove waterways are "Common Properties" even though property owners have no easement in them, a covenant to pay dredging assessments does not run with their land. To preserve the integrity of the plan of the Declaration, its covenants must run with the land. If they do not, there are very few Association members who would be obligated to pay them.

II. The Association has no "Common Properties" and therefore has no authority to levy annual assessments.

South Carolina's Braddock Cove waterways, boat channels, and salt marshes are not "Common Properties" for the reasons stated in Section I of this memorandum. Moreover, the Association admits it does not own any real property, and it admits that the State owns Braddock Cove.[84] The financial records of the Association show that it exists just for the sake of existing.[85] It has no pools to clean, no property taxes to pay, no landscaping to maintain, no streets to sweep, and no real property at all to keep up for its members. The funds that it collects

[84] Stip. ¶¶ 18, 26.

[85] Exhibit 34, Association financials.

from its annual assessments are used by the Association to hire a management company to collect more assessments, and to retain an attorney to pursue those who have not paid assessments. Occasionally, the Association might splurge on office supplies.

The Association's corporate power is limited by its certificate of incorporation to "improving, maintaining and operating the common properties of the association."[86] But the Association has no common properties to operate. Consequently, there is no authorized purpose for the annual assessments the Association imposes. Without common properties to manage, the Association's levy of annual assessments violates its certificate of incorporation and is *ultra vires.*

Consistent with the limitation on its corporate power contained in its certificate of incorporation, Article V, Section 2 of the Declaration expressly limits the authority of the Association to levy both annual and special assessments:[87]

> Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.

The Association has no Common Properties. Annual assessments are currently used only to pay legal fees, insurance premiums and to fund the circular

[86] Exhibit 4.

[87] Exhibit 1, Art. V § 2.

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administrative process of collecting next year's annual assessments—the Association spends money to collect money so it can spend more money to collect money. No money whatsoever is actually spent on managing properties.[88]

With no Common Properties to manage, it is not possible for the Association to use annual assessments for the only purpose for which they are authorized: to pay for the management of Common Properties. Annual assessments without common properties to manage are *ultra vires* under the Association's certificate of incorporation and beyond its authority under Article V, Section 2 of the Declaration.[89] The Association may not levy assessments just for the sake of raising money to pay the expenses of levying more assessments.

CONCLUSION

For these reasons, Plaintiffs requests that this Court issue a judgment declaring that (1) the Association may not legally assess Plaintiffs for dredging Braddock Cove's boat channels and waterways and enjoining the Association from levying assessments for this purpose and (2) the Association may not levy annual assessments on Plaintiffs until such time as it owns Common Properties, and enjoining the Association from levying annual assessments on them until such time as it owns Common Properties.

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[88] Exhibit 34, Association financials.

[89] *See* S.C. Code § 33-31-304 (ultra vires acts); *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 605, 538 S.E.2d 15 (S.C. App. 2000) ("acts beyond the scope of the powers so granted are ultra vires. . . .").

Respectfully submitted,

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Stanley S. Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; Peter Trager, and Vacation Inn, LLC, each both individually and derivatively, Plaintiffs, Vs. Sea Pines South Beach Owners' Association, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL CASE NO.: 2021-CP-07-01655 **SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.'S CORRECTED TRIAL BRIEF**

PRELIMINARY STATEMENT

Defendant Sea Pines South Beach Owners' Association (the "Association") submits this CORRECTED brief to correct several cites to exhibits (in red) and to assist the Court with the issues to be presented at the trial, scheduled for May 3, 2024. There is no genuine issue as to any material fact. To this end the parties have entered a stipulation of facts and documents, which will be submitted to the Court prior to trial.[1] As a result, the trial should only will involve arguments from the parties in support of their respective positions.

The crux of this case is construing two recorded documents: (i) Covenants and Restrictions for South Beach and Provisions for the South Beach Owners' Association Inc. recorded in Deed Book 176 at Page 203, on August 18, 1970 (the "Covenants") (Ex. 1), and (ii) Modification of Covenants recorded in Deed Book 435 at Page 532 on November 28, 1985 (the Modification) (Ex. 3).

[1] Reference herein to a particular fact in the stipulation will be "Stip." followed by the paragraph number. Exhibits listed in the second section of the stipulation will be referenced herein as "Ex." followed by the number on the document list of the stipulation.

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PROCEDURAL BACKGROUND

Plaintiffs filed the Summons and Complaint on September 13, 2021, individually and derivatively. Plaintiffs alleged two causes of action: (i) Breach of Covenants in the Nature of Contract/Declaratory Judgment and (ii) Ultra Vires Action/Injunction and Declaratory Relief. (See Complaint). The Association filed a First Amended Answer and Counterclaim on June 28, 2022. The Association denied Plaintiffs' claims, asserted numerous affirmative defenses based on statute and common law, and asserted a counterclaim for a Declaration from this Court that the Covenants, as modified and amended, is enforceable.[2] Earlier, each party filed motions for summary judgment stating that there are no material facts genuinely in dispute. The Court denied the motions.

FACTS BASED ON THE PARTIES' STIPULATION[3]

The Association Area

The Covenants govern the Association and its member properties. There are approximately 500 properties within the Association, including properties owned by Plaintiffs. Braddock Cove is a navigable tidal creek that meanders for about a mile from Calibogue Sound along properties owned by some of the members of the Association, as well as other private properties not within the Association area. (Stip., Par. 12). For the demonstrative purpose of showing the area of Braddock Cove and other properties see maps and aerial photo attached as Exhibit 20.

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[2] The Association filed a Rule 12(b)(1) Motion to Dismiss on February 23, 2023 with exhibits, a Motion for Summary Judgment Pursuant to Rule 56 on February 16, 2023, a Memorandum in Support of Summary Judgment and exhibits on February 21, 2023 with exhibits, an Amended Memorandum In Support of Its Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment with exhibits on March 8, 2023, and a Response to Plaintiff's Reply on April 17,2023, each of which is fully adopted by the Association, and of which is incorporate herein by reference as if set forth fully.

[3] The facts recited herein are from the stipulation of facts ("Stip.") entered by the parties or reasonable inferences therefrom.

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The membership area includes all properties, both residential and commercial, in the area starting at Scaup Court on the east side and South Beach Villas on the west and continuing to and including Lands End. (Exhibit 8).

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The Covenants

The Covenants introductory clauses recite the goals for "the planned unit development known as South Beach." Those goals include creating "permanent parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks," all as "Common Properties." The introductory clauses also note the desire to "**provide for the preservation of the values** and amenities in said community and for the maintenance of said parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhome areas, **and other Common Properties."** Finally, the introductory clauses state that there will be liens on the properties within the Association and charges to maintain the "Common Properties."

(Emphasis added.) (Ex. 1.)

In 1985 the Association amended the definition of "Common Property" to include: "all boat channels, waterways, channel marker and salt marsh open spaces of Braddock Cove …" as follows:

> The Declaration of Covenants and Restrictions for Sea Pines South Beach Owners Association, Inc., as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 176 at Page 203, are herewith amended as follows, to-wit:
>
> > Article 1, Section 1, Paragraph (c) - "Common Properties" is herewith amended by broadening the definition of Common Properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.
> >
> > Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985, and recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 433 at Page 65.

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By this amendment the Association created for itself the right, upon 75% voter approval, to assess its members for maintenance dredging of Braddock Cove. This is so because the Covenants provide for assessments for maintenance of Common Properties. The Covenants state in Art. V, § 2:

> Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of Common Properties …

The Covenants further provide in Art. V, § 4:

> Special Assessments for Improvements and Additions. In addition to the annual assessments authorized by § 3 hereof, the Association may levy special assessments, for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, unexpected repair or replacement of a described capital improvement upon the Common Properties … provided that any such assessment shall have the assent of three-fourths (3/4) of the vote at a duly called meeting of Members …

(Ex. 1.)

The right to self-impose an assessment for maintenance dredging of the waterways with 75% approval is a significant right for the overall well-being of the South Beach community. (Ex. 8, p. 3). Use of the waterways becomes severely limited and without periodic maintenance dredging Association property values would plumet. There can be no debate that the navigability of the creek is of immense importance to Association members. To maintain adequate depths in Braddock Cove the creek must be dredged periodically to remove the pluff mud, which naturally moves in with the tides. (Ex. 9, p. 7). Without dredging, the creek silts in and becomes mud flat awash only at high tide. When dredging is neglected for 10 years, this is what Braddock Cove looks like, see Ex. 25 pp.33-42:

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These conditions are referred to in the August 23, 2013 Board resolution to vote on the assessment (Ex. 21), and 2013 meeting notice (Ex. 38).

Dredge Assessments in 2001, 2013 and 2017[4]

In 2001, 2013 and 2017 the Association members voted by an average of over 86% to approve the dredging. The assessments were used to pay the Association's agreed share of costs for the dredges of Braddock Cove. The Association made payment to the South Island Dredging

[4] In addition to participating in dredging Braddock Cove, the Association has been involved with other beneficial tasks for its members. In 2004, the Association worked with the Town of Hilton Head to replace the failing wood groin where South Beach meets Braddock Creek. Also, the Association opposed the commercial development of an undeveloped parcel in South Beach and urged Sea Pines manager of common properties, Community Service Association (CSA), to preserve the parcel through purchase. CSA did so and granted a right of first refusal to purchase land. (Ex. 31, Par. 10.1). Today the parcel serves as a park for South Beach (Ex. 8, p. 3). In 2016 the Association worked with the CSA and the Town to repair the Braddock Creek dam after Hurricane Matthew destroyed the dam at the upper end of Braddock Cove. (Ex. 8, PP. 4-5).

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Association, Inc. (SIDA), a non-profit South Carolina corporation created to dredge Harbor Town Yacht Basin, Baynard Creek and Braddock Cove, all located at the south end of Sea Pines on Hilton Head Island. SIDA has secured the regulatory permits over the years and has contracted with the various dredge contractors for the work. SIDA receives payment for the work from the entities/communities receiving the dredge services based on funding formulas agreed to by the participants. (Stip., Para. 19 and 21; Ex. 9, p.7.; Ex. 6, p.4.).

Plaintiff Peter Trager ("Trager") owns a 4% interest in certain real property with a mailing address of 1853 Beachside Tennis, 247 South Sea Pines Drive, Hilton Head Island, SC 29928. Trager and his wife originally took title on September 20, 1983. Trager and his wife conveyed a 95% undivided interest in this property to Carolyn S. Trager, 4% undivided interest to Peter S. Trager, and 1% undivided interest to Jennifer Paige Trager Janco on August 13, 2007. (Stip., Par. 3).

Plaintiff Vacation Inn, LLC ("Vacation Inn") bought 1732 Bluff Villas, at 3 Braddock Bluff Dr., Hilton Head Island, in 2003. (Stip., Par. 4). Vacation Inn has owned numerous parcels in South Beach Marina Village, South Beach, since 1994. (Stip., Par .5). Robert A, Gossett Jr. is the managing member of Vacation Inn., Inc. (Stip., Par 6). Gossett is the managing member of many other entities that have purchased property in South Beach since before 1984 and in the 1990's and 2000's. (Stip., Par. 7, and Ex. 26-31).

Plaintiff Stanley Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003, as amended ("Stroup") is the owner of certain real property with a mailing address of 1460 Sound Villas, 253 South Sea Pines Drive, Hilton Head Island, SC 29928. Stroup and his wife originally purchased this property in 2002 as joint tenants. (Stip., Par 2).

Each Plaintiff is a member of the Association by virtue of ownership of real

property subject to the Covenants. (Stip., Par. 14).

On November 23, 2001, 283 members of the Association were present to vote on a special assessment to dredge Braddock Cove. The special assessment passed by a vote of 239 in favor to 35 against, which represented 85% in favor. The year of 2001 was 16 years after the Modification. (Ex. 11). Gossett and Trager lived on or owned property at South Beach then but took no action to challenge the Modification or to contest the validity of the special assessment. Two years after the 2001 dredge vote, Plaintiff Stroup purchased his property at 1460 Sound Villas. 253 South Sea Pines Drive, HHI. Stroup bought with actual and constructive notice of the Modification and the 2001 dredge special assessment. Gossett controlled entities also bought many properties in South Beach after 1985, with notice of the Modification.

The second special assessment for a dredge was in 2013. The meeting was held September 28, 2013. Per the sign in sheet for the meeting Tami Horstman attended for Bob Gossett, controlling member of Vacation Inn which owns 1732 Bluff Villa. (See Ex. 13). The special assessment to dredge passed with 287 votes in favor, 40 against and 6 no opinion, passing by over 86% of the voters present representing a quorum. (See Ex. 12 – Minutes of the Sept. 28, 2013 Association Meeting, and Ex. 14 – Vote Composite for 2013 Meeting). Tager, Stoup and Vacation Inn participated in the vote, with Stroup actually voting in favor of the dredge (Ex, 14, see page 3).

The third special assessment to pay for dredging Braddock Cove was 2017. The members voted to assess themselves for the dredge by a vote of 282 of the 316 votes cast, 89%. (Ex. 15, p. 3). The Board of Directors issued a resolution affirming the membership vote for a special assessment for dredging Braddock Cove and to change the Associations quorum requirements. (Ex. 22).

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As shown in the vote composites and sign-in sheets all three Plaintiffs participated in the Covenants' democratic process by submitting their proxies and/or voting. (Exs. 11-16.) All three Plaintiffs also attended the Association meeting in 2018 to consider a proposal to create a dredge reserve fund. All three Plaintiffs voted against the proposal, and it failed. (Exs. 17-18.)

ANALYSIS AND ARGUMENT

Plaintiffs claim the Association has no right to assess for maintenance dredging of Braddock Cove because (i) the Association does not own the waterways, (ii) the Covenants and the Modification do not convey that right and (iii) the 1985 Modification is unenforceable due to certain claimed procedural defects. As will be shown below, Plaintiffs' claims are wrong and must be denied.

A. The 1985 Modification Broadening the Definition of "Common Properties" to Include all Boat Channels, Waterways, Channel Markers and Salt Marsh Open Space Areas of Braddock Cove is valid.

In Plaintiff Vacation Inn's prior lawsuit against the Association, *Catwalk LLC et al. v. Sea Pines South Beach Owners' Association, Inc.*, Court of Common Pleas For the 14th Circuit, Civil Case No. 2014-CP-07-1435 (hereafter "*Catwalk"*), Master in Equity Marvin Dukes granted defendant Association's cross motion for summary judgment and denied all plaintiffs' motion for summary judgment, including Plaintiff Vacation Inn's. In construing the Association's Covenants, Judge Dukes stated at pp. 6-7 of his order entered January 22, 2016: "It is well-settled that restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent as determined from the entire document. *Taylor v. Lindsey,* 332 S.C. 1, 498 S.E. 2nd 862 (1998); *RV Resort and Yacht Club Owners Ass'n v. BillyBob's,* 386 S.C. 313, 688 S.E. 2nd 555 (2010). Wording will be given its common and ordinary meaning.

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Taylor, id. Restrictive covenants differ from contracts in that they run with the land, meaning they are enforceable by and against later grantees. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp*., 368 S.C. 342, 628 S.E. 2nd 902 (Ct. App. 2006)*."* (Ex. 28).

Covenants are a "compact, stipulation of agreement". *Covenants*, Black's Law Dictionary, 10th Ed (2015). The entire Declaration of Covenants and Restriction is the agreement, it is the Covenant. It is ridiculous to assert the definitions are not a part of the Covenants, i.e. agreement.

Here, "the covenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change." (Ex. 1, Art. VIII, Sec 1). The Association brought to vote an amendment to the Covenants in 1985 to broaden the definition of "Common Property" on August 3, 1985. (Ex. 3). The members who voted did so unanimously in favor of amending the Covenants. (Ex. 3). The Modification was filed in with the Beaufort County Clerk of Court in Deed Book 433 Page 67 on October 22, 1985, and in Deed Book 435 page 532 on November 20, 1985. (Ex. 3). The Modification broadened the definition of "Common Property" to "include all boat channels, waterways, channel markers, and salt marsh open space areas of Braddock Cove." (Ex. 3).

Art.V, § 4 of the Covenants addresses special assessments for improvements and additions to Common Property. (Ex. 1). Art. V, § 4 grants the Association the power to levy special assessments upon its Members to defray the costs of any construction or reconstruction project, any unexpected repairs (including replacement) of any described Common Property capital improvement, which includes the necessary fixtures and personal property relating to Common Property, so long as seventy-five percent (75%) of Members approve of the special assessment by vote at a duly called meeting. (Ex. 1). Art. VII, § 1 of the Covenants requires 75% vote of the

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Members at the duly called meeting of the Association. (Ex. 1). The dredge assessments passed by an average of over 86% at the duly called meetings in 2001, 2013 and 2017.

The primary purpose of an Owner's Association is to protect and preserve the property values in the community over which the Owner's Association governs. This is the same for the Association here as stated "to provide for the preservation of values" (Ex. 1). The South Beach community is surrounded by water on three sides. Without the access to the water, the community is less attractive. Moreover, due to the proximity to the water including Braddock Cove, the value of the properties within the community enjoy an increased value. Because the primary purpose of the Association is to preserve the value of the properties in the South Beach community, the Association's ability under the Covenants to levy special assessments upon the requisite three-fourths vote of its members, is *intra vires*. In addition, even if a member does not own a boat or other marine craft, Braddock Cove, without the dredging, would be full of silt, mud, and other debris, thus providing a nuisance to those who both live in South Beach and who access the cove. This type of nuisance would have a negative effect on the value of the properties within the community because South Beach would not be as desirable of a location.

Plaintiff brags that there are times when the Association does not participate in the Cove is dredged anyway. That is wrong. Yes, there are times when the Association has not been able to participate in the dredge, but when that occurs the dredge stops at conveniently at Mr. Gossett's Marina, rather than continuing to the end of the Cove. (Stip., Par. 24 and 25).

South Carolina Code Ann. §33-31-302 supports the Association's ability and determination to levy a special assessment for the dredging of Braddock Cove. Unless otherwise provided in a corporation's Art.s of incorporation, "every corporation has perpetual duration and succession in its corporate name" and has the same abilities as an individual to do all things

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necessary or convenient in carrying out its affairs, without limitation. S.C. Code § 33-31-302. This includes the ability to "purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located." S.C. Code § 33-31-302(4). In addition, any corporation has the right and duty "to do all things necessary or convenient, not inconsistent with the law, to further the activities and affairs of the corporation." S.C. Code § 33-31-302(18). The Official Comments to § 33-31-302 state, in part, that this new version of the statute should be broadly interpreted and gives all nonprofit corporations "unbridled power" to further their activities and affairs in any necessary or convenient matter consistent with the law.

B. There is no Rule that requires Common Property is Limited to Deeded Property.

There is no rule that says the definition of "common property" must be limited to deeded property. The waterways are an integral part of the Association community, and the Association has a strong interest in maintaining the navigability of the Braddock Cove waterways. Plaintiffs can cite no law prohibiting the Association from amending the Covenants to include the waterways in the Covenants' definition of "common property." Indeed, the South Carolina Non-Profit Act, 1994 Act No. 384, § 31-33-302 provides that unless the non-profit's Art.s of incorporation provide otherwise, the non-profit has the same power as individuals to do all things necessary and convenient to carry out its affairs including, without limitation, power: (15) to impose dues, assessments …, and (18) to do things necessary and convenient , not inconsistent with law, to further the activities and affairs of the corporation.

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There is nothing in the Covenants that proscribe amending the definition of "common property" to include the waterways and there can be no doubt that maintaining the navigability of the waterways is a vital concern to Association members[5].

In order to adequately preserve the value of South Beach, the Association has the ability to bring to vote a special assessment to dredge Braddock Cove because the community is on the cove. Access to the cove is imperative to the community and, without dredging Braddock Cove, Member access to it is negatively impacted and the value of the real property is diminished. Furthermore, the Modification was approved by the requisite number as stated in the Covenants. As such, Modification was appropriate to bring Braddock Cove under the "Common Property" umbrella.

C. Dredging is Construction and the Covenants allows for Special Assessments to be Levied for Construction Purposes.

Contrary to Plaintiff's argument, dredging is a type of construction. Art. V, § 4 grants, in relevant part, the Association the power to levy special assessments upon its Members to defray the costs of any construction or reconstruction project. (Ex. 1, Art. V, § 4). To "construct" means "to build; erect; put together; *make ready for use*." *Construct*, Black's Law Dictionary, 6th ed. (1990) (emphasis added). To "dredge" means to "dig, gather, or pull out with or as if with a dredge." *Dredge*, https://www.merriam-webster.com/dictionary/dredge. Furthermore, 13 C.F.R. §

[5] Indeed, after an exhaustive study of the need and propriety of dredging the south Sea Pines waterways (Harbortown Yacht Basin, Braddock Cove Creek and Baynard Creek) in 2011 the governing bodies of Sea Pines passed a joint resolution adopting the report of a specially empaneled waterways task force: 8. The Task Force considered the adverse effects of not dredging the Sea Pines Waterways including the effects the Heritage Golf Tournament, tourism in general and more specifically … the South Beach Village... and the values of our homes…The Taks Force concluded that there would be significant adverse effects if dredging were not conducted as soon as possible. (Ex. 32).

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121.201 classifies dredging as "Other Heavy and Civil Engineering Construction." 13 C.F.R. § 121.201 (2014).

Moreover, the permits from both the Department of the Army and the S.C. Dept. of Health and Environmental Control ("DHEC") refer to dredging as "construction" throughout their respective permits and refer to the people and companies doing the work as contractors. (Ex. 7 -a word search of the 112 pages shows construction is mentioned 86 times and contractor is mentioned 15 times). The DHEC permit for the subject dredging at page 42 of Ex. 7 provides:

> The S. C. Contractor's Licensing Act of 1999, enacted as § 40-11-5 through 430, requires that all construction with a total cost of $5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. All listed special and general conditions will **remain** in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.

Because dredging is considered construction by both the federal and state governments, and the activities associated with dredging comport to the definition of "construction", it is readily apparent that dredging is construction. Therefore, the levying of a special assessment is an appropriate action of the Association.

D. Plaintiff's Procedural Challenges to the 1985 Modification are without Merit.

In earlier pleadings and memoranda Plaintiffs claimed the Modification was invalid because of insufficient notice of the meeting on August 3, 1985 when the Modification was, "by unanimous vote", adopted. Plaintiffs likely will argue at trial that the reference in a separate paragraph to a Quit Claim deed dated July 15, 1985, proves that Members were not given thirty days' notice as required by the Covenants. First of all, the property interests upon which Plaintiffs bring this lawsuit were not Members of the Association in 1985 and have no standing more than

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thirty-six years later even to make a procedural challenge[6]. Each Plaintiff acquired the property interest here after 1985 and are bound by the recorded title documents, including the Modification. The date of the Quit Claim deed referenced in the Modification offers no proof of a failure to give appropriate notice or whether the Members may have waived notice. The Modification was adopted unanimously.

The next procedural challenge Plaintiffs likely will make is that the Modification does not satisfy Art. VIII § 1, which specifies that no amendment "shall be effective unless made and recorded sixty (60) days in advance of the effective date of such change." The Modification states no effective date and there is no contention that the amendment was applied in less than sixty days from adoption or recording. In other words, the Covenants' sixty-day requirement would apply as a matter of law to any attempt to apply the amendment in less than sixty days but no attempt to apply it occurred. The issues before this Court are thirty-six years after adoption and recording of the Modification.

Plaintiffs also claim that the Modification is an effort to add property to the planned community and make it subject to the covenants in contravention to the requirements of Art. II § 2. That § is not applicable here because Braddock Cove is not added lands such that it would be a member property subject to being assessed. The Modification is simply amending the definition of "Common Properties" by including the Cove in the definition. The *Fairways Country Lakes Townhouse Ass'n v. Shenandoah Development Corp.* case the Plaintiff site, has nothing to with this Association's ability to amend definitions in its Covenants. Rather the case concerns a

[6] Plaintiff Trager first acquired his property in 1983. However, he did not acquire the property interest upon which he sues here until 2003. (Stip., Par. 3.)

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developers' rights to annex additional property into the existing Association, whose owners would be subject to assessments. It is irrelevant

E. Plaintiffs' Claims Against the Association are Time Barred.

South Carolina Code § 15-3-520(b) provides for a twenty-year statute of limitations for "an action upon a sealed instrument, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in § 15-3-530." Plaintiff will argue that the Modification is a sealed instrument, and therefore a 20 statute of limitations applies. In that case an action had to be brought by 2005. This action is 16 years too late as the Plaintiffs' filed this action on September 13, 2021. (See Summons and Complaint). If the three-year statute of limitations applicable contacts apply, the last dredge assessment vote was 2017, 4 years before suit was filed.

Statute of limitations exists for many reasons, not the least of which, as in this case, is to allow an organization to conduct its activities with confidence in reliance on governing documents that have been in place and unchallenged for almost 50 years (Covenants) and 36 years (Modification). The Association's actions have been guided by the correct conclusion that the Modification is valid. Actions have been taken over the past 3 decades with reliance on that conclusion. The prejudice to the Association by the Plaintiffs doing nothing to enforce their alleged rights is extreme. Like much of Hilton Head Island, the South Beach community has experienced unprecedented number of real estate transactions over the years. (Ex. 9, p. 1, Fall 2021 Newsletter). People have moved to the community over the last 36 years with the belief that their community is creek side, not located on a mud flat.

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The Modification to the Covenants is valid and the Plaintiffs challenges are time-barred from bringing this action.

F. The Member's Vote to Approve the 1985 Modification, as well as the Dredging Assessment in 2001, 2013, and 2017 Ratified the Association's Actions.

Any possible procedural flaws are of no consequence because the Members' vote to approve the Modification ratified the action taken by the Association. In addition, the subsequent votes approving the dredge projects in 2001, 2013, and 2017 ratified any violative actions[7].

Ratification "means the express or implied adoption and confirmation by one person of any act or contract performed or entered into in his behalf by another at the time assumed to act as his agent." *Lincoln v. Aetna Ca. & Sur. Co.*, 386 S.E.2d 801, 803 (S.C. 1988). Additionally, ratification relies upon the assumption that no prior authority was present. *Certus Bank N.A. v. Bennett*, 2016 WL 757501, at *3 (Ct. App. Feb. 24, 2016). "However, once a ratification has occurred, it is equivalent to original, prior, or previous authority." *Id.*

Three (3) elements must be proven to establish ratification: (1) the principal accepts the benefits of the agent's acts; (2) the principal has full knowledge of material facts; and (3) there were "circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements." *Jinks v. Sea Pines Resort, LLC.*, No. 9:21-CV-000138-DCN, 2022 WL 3691391 at *8 (D.S.C.Aug. 25, 2022). "A fact is material to the choice of a principal to ratify an agent's unauthorized act if it concerns the existence and the extent of the obligations created by the transaction." *Anthony v. Padmar, Inc.*, 465 S.E.2d 745, 755 (Ct. App. 1995).

[7] The Covenants' requirement of 75% voter approval with the appropriate quorum for passing special assessments for maintenance dredging is the same requirement for amending the Covenants. (Ex. 1, Art.VIII, § 1.) In effect, passing special assessments is the practical equivalent of amending the Covenants to do so.

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Here, the Members, including the Plaintiffs accepted the benefits of dredging Braddock Cove waterways, had full knowledge of the special assessments for dredging assessments in 2001, 2013 and 2017, participated in meetings and voting and paid their charges for the dredging. Thus, as the District Court in *Jinks* dismissed the procedural challenges there because of Jinks' ratification, so too must this Court dismiss Plaintiffs' procedural challenges to the Modification.

G. Plaintiffs are Estopped from Bringing this Action Under the Principal of Collateral Estoppel Because the Issue of Whether an Association Member is Encumbered by and Subject to the Covenants was Previously Determined and Upheld on Appeal.

Collateral Estoppel is a principal of law that prevents the litigation of an issue that was decided in a prior action. *Carolina Renewal, Inc. v. S. C. Dept. of Transp.*, 385 S.C. 550, 554 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)). The asserting party must prove three requirements: (1) the present issue was actually litigated in the previous action; (2) the present issue was "directly determined in the prior action"; and (3) the issue was "necessary to support the prior judgment. *Id*. (citing *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189-90 n. 1 (Ct. App.. 1984). Traditionally, collateral estoppel required party mutuality to provide a bar to relitigating the issue. *Snavely v. AMISUB of S.C., Inc.* 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008). However, the modern approach relaxes the requirement of mutuality. *Id*.

a. The Issue of Enforceability in the Present Case was Actually Litigated in the Previous Action, *Catwalk, LLC v. Sea Pines South Beach Owners' Assoc., Inc*..

The issue of whether the Members of the Association were subjected to, and encumbered by, the Covenants was actually litigated in *Catwalk*. (Exhibits 26-30). In *Catwalk*, this Court determined that the Covenants, and necessarily all amendments including the Modification, subjected and encumbered the Members' property. (Ex. 27 and 28). This included the

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Association's right upon 75% Member vote at duly held meetings to levy special assessments. Plaintiffs' Complaint, supporting affidavit, and Motion for Summary Judgment in *Catwalk* expressly complained about Association assessments. (Ex. 26.)[8] The South Carolina Court of Appeals affirmed this Court's decision in *Catwalk, LLC*. (Exhibit 29). Plaintiff Vacation Inn, LLC was a party in the previous action. Moreover, in Robert Gossett's motion for summary judgment in *Catwalk*, Mr. Gossett states that the assessment of concern was a special assessment for the dredging of Braddock Cove. (Exhibit 26 and Catwalk's Motion for Summary filed in that case attached)[9](also see Exhibit 6 to Defendant's Motion to Dismiss).

The issue of whether the Members of the Association were subjected to, and encumbered by, the Covenants, including the Covenants' assessment provisions was actually litigated, the first element of collateral estoppel is proven.

b. The Issue of Enforceability in the Present Action was Directly Determined in the Prior Action.

The issue of whether the Members of the Association were subjected to, and encumbered by, the Covenants and an assessment for the cost of dredging was directly determined in *Catwalk.* In *Catwalk*, this Court determined that the Plaintiff, Vacation Inn, LLC and its properties are not exempted from the Covenants but are instead encumbered by and subject to the Covenants, including amendments, and another declaration of covenants, referred to in *Catwalk* as the 1973

[8] In paragraph 34 of the *Catwalk* Complaint and Affidavits attached (Ex. 26, Aff. Par 12) Plaintiffs complain that the Association asserts that Plaintiffs are "obligated to pay assessments imposed" by the Association. In their Notice and Motion for Summary Judgment the Plaintiffs' (including Vacation Inn) owner, Robert Gossett, states that not until July 2013 did the Association ever seek to impose assessments on his properties, including those in the name of Vacation Inn. Gossett's statement about Association assessments on his properties in July 2013 was prompted by dredge funding discussions, which culminated with Members passing a dredge assessment at the September 2013 meeting. The *Catwalk* Notice and Motion for Summary Judgment and Exhibits, filed June 15, 2015 is incorporated herein by reference as if set forth fully. (See *Catwalk* Notice and Motion for Summary Judgment, Pars. 12-14, 16, 18,20, and pp. 11-12). Thus, the issue of whether the Covenants gave the Association the right to impose assessments was plainly put in issue in *Catwalk*.

[9] Mr. Gossett owns Vacation Inn, LLC.

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Commercial Use Covenants. One issue in *Catwalk*, which was asserted in the Complaint, supporting affidavit, and Motion for Summary Judgment, was the Association's ability to levy special assessments, including the cost of dredging, upon its Members and their South Beach property. Furthermore, the South Carolina Court of Appeals affirmed this Court's decision and the Supreme Court denied cert. (See ex. 29 and 30). According to the *Catwalk* Appellate Court, because subsequent deeds of conveyance included the 1970 Covenants, "the only *reasonable* inference is the 1970s Covenants remain in effect as to Appellant's properties." (Ex. 29).

Therefore, the issue of whether the Members of the Association were encumbered by, and subject to, the Covenants was directly determined in *Catwalk* and the second element in a claim of collateral estoppel has been proven.

c. The Enforceability Issue in the Present Action was Necessary to Support the Judgment in *Catwalk, LLC v. Sea Pines South Beach Owner's Assoc., Inc.*

The final element a movant must establish to prove collateral estoppel is the necessity of the present issue to support the prior judgment. *Id*. The present issue of whether the Members of South Beach were subjected to, and encumbered by, the Covenants was the issue in *Catwalk*. This Court determined the Covenant encumbered the Members' properties. Therefore, this element of collateral estoppel has been proven.

Because all three elements of collateral estoppel have been met, Plaintiffs are estopped from litigating whether the Association may asses for maintenance dredging upon a 75% Member vote approval.

H. *Res Judicata* or Claim Preclusion Bars Plaintiffs' Claims.

Plaintiffs are estopped from bringing this action under the principal of *res judicata*, or claim preclusion. To succeed on a *res judicata* argument, the party asserting claim preclusion must prove three conditions: (1) the prior judgment was a final judgment on the merits, rendered by a court of

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competent jurisdiction and in accordance with due process requirements; (2) the parties in the prior case must either be identical or in privity with the parties in the present case; and (3) the claims in the present case are based upon the same cause of action as the prior proceeding. *Shadow Factor Film Ltd. v. Swilley (In re Swilley)*, 295 B.R. 839, 846 (Bankr. D.S.C. 2003) (citing *Hagan v. McNallen (In re McNallen)*, 62 F.3d 619, 624 (4th Cir. 1995)). "Collateral estoppel precludes relitigating an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in [the] earlier proceeding." *Id*. Final judgment on the merits in a prior action will preclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues **that might have been litigated** in the first action." *Nelson v. QHG of S.C. Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003). (Emphasis added). Here, we have shown that all three conditions are met:

(1) *Catwalk* was a final judgment on the merits, rendered by a court of competent jurisdiction and in accordance with due process requirements;

(2) The parties were identical to, or in privity with, the parties in the prior action. Here, we have both. Privity, with regard to *res judicata*, refers to the relationship of a party to the litigation's subject matter. *Id*. 354 S.C. at 308, 580 S.E.2d at 181. "'Privity' means one so identified in interest with another that he represents the same legal right." *Id*. Plaintiff Vacation Inn, LLC and the Association are parties identical in both the prior *Catwalk* decision and in the present action. Furthermore, Plaintiffs Stroup and Trager are in privity with Plaintiff Vacation Inn, LLC because all three plaintiffs are real property owners within the Association and are subject to the same Covenants and Modification. Therefore, the second *res judicata* condition has been met;

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(3) The causes of action in *Catwalk* sought (i) a declaratory judgment that the Plaintiffs' real property was not encumbered by the Covenants, the Plaintiffs are not members of the Association, and the Plaintiffs have no liability for assessments made or imposed by the Association and an injunction to prevent the levying of special assessments for the dredging of Braddock Cove. (Exhibit 26). There are two causes of action in the present case: (1) Breach of Covenants in the Nature of Contract and (2) Injunction and Declaratory Judgment. The injunctive relief stems from the levying of special assessments for the Braddock Cove dredging project and the declaratory judgment stems from the alleged inability of the Association to levy special assessments for Braddock Cove dredging projects. In their motion for summary judgment in *Catwalk,* Vacation, Inn admits that the assessments at issue in *Catwalk* are the special assessments that were levied to fund the earlier Braddock Cove Creel dredge project. Because the claim in the present case, that the Association cannot levy special assessments for the dredging of Braddock Cove, are based upon the same cause of action involved in the prior *Catwalk* decision, the third *res judicata* condition is met.

Therefore, *res judicata* is appropriate to estop Plaintiffs from proceeding with this action.

I. Plaintiffs have waived any rights to contest the 1985 Modification and special assessments because they had Actual and Constructive Notice of the Covenants Upon Purchasing Property in the South Beach Community.

Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. *Janasik v. Fairway Oaks Villas Horizontal Property Regime,* 307 S.C. 339, 415 S.E.2d 384, 387-388 (1992). Acts that are inconsistent with continued assertion of a right

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may give rise to waiver. *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994).

Plaintiffs had at least constructive notice of the Covenants and the Modification at the time they acquired their property interests in South Beach. All acquired interests upon which they bring this lawsuit after the Covenants were recorded in 1970 and the Modification was recorded in 1985[10]. In acquiring their property, Plaintiffs accepted being encumbered by and subjected to the Covenants, including the Modification. Plaintiffs' choices were to acquire their interests subject to the Covenants as amended, which run with their titles, or not acquire those interests. "Property owners are charged with constructive notice of instruments recorded in their chain of title." *Binkley v. Rabon Creek Watershed Conservation Dist. Of Fountain Inn*, 348 S.C. 58, 71 558 S.E.2d 902, 909 (Ct. App. 2001). Each of the Plaintiffs made a choice to acquire their interests and in doing so accepted the Covenants as amended.

All three Plaintiffs participated in the Covenants' democratic processes by submitting proxies and/or voting at some or all of the Member meetings in 2001, 2013, 2017 and 2018. (Stip. Exs. 11 -18). Stroup voted for the dredge assessment in 2013 (Ex. 14, p. 3). Such participation over the course of many years waives any right to complain about the provisions of the Covenants or the Modification.

J. **All Plaintiffs are Equitable Estopped from Contesting the Validity of the 1985 Modification**.

[10] Stroup acquired his property in November 2003. Trager acquired his 4% interest in August 2017. Vacation Inn acquired its property in September 2003. (Stip., Pars. 2-4)

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Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do. *Lee v. Southern Railway Co.,* 228 S.C. 240, 89 S.E.2d 431 (1955); *Janasik v. Fairway Oaks Villas Horizontal Property Regime,* 307 S.C. 339, 415 S.E.2d 384 (1992). It may arise even though there was no intention by the party to relinquish or change any existing rights. *Janasik, supra.* The essential element of estoppel is prejudice to the party raising the defense. *Id.* As we noted in *Janasik,* "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Id.* 307 S.C. at 344, 415 S.E.2d at 388.

Plaintiffs benefit and have benefitted in the past from the actions of the Association, including funding of the dredging of Braddock Cove, and should be estopped from any relief. Many owners have bought in South Beach since 1985. They have done so with the knowledge that they can choose by their vote whether to maintain the navigability of Braddock Cove by funding the dredge. What they did not buy with knowledge of is the idea that 3 owners, because they did not get their way, can subvert the will of the majority. Of course, under South Carolina the three Plaintiffs cannot subvert the legal actions of the Association. Moreover, given that the three Plaintiffs waited 36 years and gained an interest in property after the Modification and after special assessments were issued, they are estopped from contesting the initiatives now.

The corporation has a right to conduct activities and plan for the future based on a reliance on provisions of their Covenants and all amendments that have been in place for 36 years and not contested. The Plaintiffs are estopped from contesting the validity of the Modifications and subsequent special assessments.

K. This is not an appropriate Shareholder Derivative Action

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A derivative suit is a lawsuit brought by one or more shareholder or members on behalf of the corporation against the corporation's directors, officers, or other third parties who breach their duties. The claim of the suit is not personal but belongs to the corporation. It seeks to remedy a loss to the corporation. SCRCP, Rule 23(b)(1); *Ward v. Atlas Const. Co., Inc.*, 278 S.C. 346, 278 S.E.2d 621 (1981); *Patterson v. Witter,* 425 S.C. 213, 821 S.E.2d 677 (2018). Here, the Plaintiffs have sued the Association, not the board of directors or other third-parties. (See Summons and Complaint). Although the caption of the Complaint indicates the Plaintiffs are acting individually and derivatively, nowhere in the pleading does it identify claims that are being made on behalf of the Association but moreover, it only makes claims against the Association.

In addition, a derivative action may not be maintained if it appears that the Plaintiffs do not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. SCRCP, Rule 23(b)(1). Here over 86% of the members have voted time and again in favor of the dredge of Braddock Cove. The three Plaintiffs clearly do not adequately represent the members similarly situated.

For these reasons, the Court must find in the Association's favor.

L. **Plaintiffs' claims that the Association's acts are *ultra vires* are barred by S.C. Code §33-31-304(b).**

South Carolina Code Ann. § 33-31-304 governs *ultra vires* actions and provides:

> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

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> (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General.

A fair reading of the Complaint illustrates that these Plaintiffs did not bring the claims on behalf of the Association. Moreover, all act being complained of by the Plaintiffs occurred before the present action was filed. For example, if a corporation is about to enter into a binding commitment in violation of its Articles, a proceeding could be brought to enjoin the corporation if a third party had not acquired any rights. S.C. Code Ann. § 33-31-304, Official Comments. Therefore, the actions cannot now be challenged based on the plain language of the statute.

CONCLUSION

The Court should declare that the Covenants, as amended by the Modification, create the right for Association Members to self-impose, upon 75% voter approval at duly held meetings, assessments for funding the Association's share of maintenance dredging of Braddock Cove. Accordingly, the Court should deny Plaintiffs' claim in this regard and grant the Association's requested counterclaim.

In addition, the Court should conclude that Plaintiffs' claims are barred by preclusion and the statute of limitations. Also, the Court should conclude that Plaintiffs have not demonstrated entitlement to derivative status and that there is no basis for Plaintiffs' claims that the Association's actions as contested are ultra vires.

Finally, the Court should dismiss with prejudice all Plaintiffs' claims and enter judgment with costs in favor of the Association.

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/James H. Elliott, Jr.

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April 27, 2023
Mount Pleasant, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both individually and derivatively, Plaintiffs/Counterclaim Defendants, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant/Counterclaim Plaintiffs.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No. 2021-CP-07-01655 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' TRIAL BRIEF**

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RESPONSE TO PRELIMINARY STATEMENT

To be clear: the dredging of Braddock Cove does not depend on the Association. Braddock Cove does not belong to the Association; the Association does not own it, and the Association has no power to dictate what becomes of it. The out-dated, dramatic, low-tide photographs that the Association includes in its Trial Brief are immaterial to the legal question of whether this property owners' association can use its corporate power to force its members to pay for something in which the members—quite literally—have no interest. This court will hear and read some lengthy, complex legal arguments on the subject, but the answer to the question is easy and almost intuitive: No. The Association cannot force its members to pay for dredging of public waterways, any more than it could force its members to re-pave Interstate 95, even if the Association earnestly believes that better public roads or better public waterways would improve its members' property values.

The Association comes before this Court wringing its hands, "What is it to do if it cannot force its members to pay to dredge the State's waterways?" Certainly, it could solicit *voluntary* contributions from its members (as the Association points out in its Brief, it has about 280 members, out of 500+, who seem to vote in favor of dredging whenever they are asked).[1] But the Association cannot

[1] Moreover, there is an entire company, the South Island Dredging Association, which exists for the sole purpose of facilitating periodic dredges of the Braddock Cove waterways. Its membership is voluntary, participation in dredges is voluntary, the amount of contribution is voluntary . . . and it gets the job done.

use its assessment powers to compel all of its members—including those who live nowhere near the Cove—to cough up several thousand dollars every few years, under the threat of a lien on their property, to dredge the public's boat channels.

ARGUMENT

A. The 1985 Modification is void and without effect, for a host of reasons.

The Association begins its argument by giving lip service to the importance of contract construction, and to the nature of restrictive covenants as a type of contract that runs with the land. It then throws those lofty platitudes right out of the window—arguing that the clear requirements of the contract do not matter, if only about half of the members vote to assess and encumber their non-consenting neighbors' land to pay to support the State's navigable waterways, which have no legal connection to the Association's members' property.

According to the Association, the community's Declaration (which contains a multitude of express requirements for common properties), is essentially meaningless; it may be trumped by the vote of a slim majority, and it may be fundamentally altered by a quitclaim deed that conveyed nothing at all. This is wrong under South Carolina law: the members of the Association, including the Plaintiffs, bought their property in reliance that the covenants—which mean what they say and which must be strictly construed—are binding on the Association as well as the members.[2] Among other things, the unambiguous Declaration is clear

[2] *Queen's Grant v. Greenwood Development*, 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006) ("[R]estrictive covenants affecting real property cannot be properly and fully understood

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that "Common Properties" are only properties owned by the Association. They must be conveyed by deed for the purpose of the use and enjoyment of the members. This intended ownership interest on behalf of the Association is necessary if the corresponding obligation to pay assessments by the Owners is to touch and concern their land. Thus, members are granted appurtenant real property interests in the common properties; the Declaration's Article IV is entitled "PROPERTY RIGHTS IN THE COMMON PROPERTIES,"[3] and it goes on to itemize a myriad of real property rights and interests—none of which pertain to the State's navigable waterways and marshlands. For example, there is no question that Plaintiffs do not have an appurtenant easement in the State's boat channels;[4] similarly, the Association does not have the right to penalize members by suspending their right to use a public waterway.[5]

Further, the Association's purpose is much more specific than the generalized "preservation of values" that the Association plucks from the Declaration. In fact, the developer created the Association for a precise reason:

FOURTH: The purpose of the said proposed Corporation is **improving, maintaining and operating the common properties of the association for the benefit of the health, welfare and recreation of the members of the association.**

without resort to property law. Restrictive covenants differ from contracts in that they 'run with the land,' meaning that they are enforceable by and against later grantees.").

[3] Exhibit 1, Art. IV.

[4] Exhibit 1, Art. IV § 1.

[5] Exhibit 1, Art. IV § 3.

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(Exhibit 4, Certificate of Incorporation). This purpose aligns with the developer's original intent, which was to convey amenities to the Association to hold as common property on behalf of all owners. Common property is therefore defined as "land with any improvements thereon which are deeded to the Association and . . . devoted to and intended for the common use and enjoyment of the owners of the Properties."[6] But the developer[7] went through bankruptcy, and during this time of fincancial hardship much of the planned community property was conveyed to an entirely different entity called Community Services Associates, Inc.[8] Thus, **the Association owns no real property whatsoever, a fact which it admits**.[9]

Perhaps recognizing that it has no real property right to assess its members to dredge the State's waterways, the Association pivots to a truly frightening (and truly wrong) argument: it claims that because it is a nonprofit company, it has "unbridled power" under the Nonprofit Corporation Act "to do all things

---

[6] Exhibit 1, Art. 1 § 1(c) (emphasis added).

[7] The original developer of Sea Pines was Lighthouse Beach Company; it subsequently assigned its interest to the Sea Pines Plantation Company. Both entities were owned and controlled by Charles Fraser, the master developer of the entire Sea Pines Plantation community.

[8] *See, e.g.*, Exhibit 36, Declaration of Covenants for the Transfer of Properties, Reserved Rights, and Obligations to Community Services Associates, Inc., pp. 1-5 ("Whereas . . . Lighthouse Beach Company . . . recorded certain declarations, restrictions and covenants. . . .Whereas in accordance with that certain Second Amended Joint Plan of Reorganization . . . [developer] has agreed to convey certain categories of property within the Sea Pines Plantation referred to therein as "Community Properties" . . . Whereas, the [Developer] is the record title owner of roadways, bike paths, streets, open spaces, lagoons, ditches, and other properties, all as more particularly described in Exhibit C ("Community Properties") . . . Whereas [Developer] . . . assigns . . . ownership of all real property listed in Exhibit C to [Community Services Associates, Inc.]." and Exhibit C: Identifying the plat for South Beach.

[9] Stip. ¶ 18.

necessary or convenient" "to further the affairs of the corporation." But in making this argument, the Association omits key words from the section of the Nonprofit Corporation Act that it cites. The omitted words show that the Act tethers corporations to their governing documents—nonprofit corporations are as bound by the obligations of covenants and restrictions as any individual. In full, the provision states:

> **Unless its articles of incorporation provide otherwise**, every corporation has perpetual duration and succession in its corporate name and **has the same powers as an individual** to do all things necessary or convenient to carry out its affairs including . . . all things necessary or convenient, **not inconsistent with law**, to further the activities and affairs of the corporation.

S.C. Code § 33-31-302(18) (emphasis added). The Association's power is obviously not unfettered — it is subject to clear and specific limitations. Corporate powers do not authorize a corporation to violate with impunity the contracts it makes and by which it is bound. In other words, the Association cannot violate the express provisions of a Declaration that runs with the land simply because it is a nonprofit company.

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B. There is a "rule" that requires Common Property to be deeded property: it is found in the same Declaration of Covenants that the Association describes as a "compact, [or] stipulation of agreement."

Ignoring the express terms of the Declaration, the Association incorrectly argues that there is no "rule" that common property must be deeded to or owned by the Association. To be clear, the Declaration states:

> "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are **deeded** to the Association and designated in said deed as "Common Properties."[10]
>
> . . .
>
> Title to Common Properties. . . . the [Developer] hereby covenants, for itself, its successors and assigns, that it shall convey the Common Properties to the Association **within one hundred eighty (180) days of the time they are completed**.[11]

Even if the 1985 Modification was effective (it was not) to amend the Declaration by adding the words "to include all boat channels, waterways, channel markers, and salt marsh open spaces," those additional words would not change the Declaration's requirement that common property be owned by the Association.

Moreover, it is hornbook property law that if covenants and obligations are to run with the land, then they must be reciprocally binding on the property that they concern.[12] Here, the Declaration clearly intends common property to be

[10] Exhibit 1, Art. I (emphasis added).

[11] Exhibit 1, Art V (emphasis added).

[12] "Restrictive covenants that require grantees to pay assessments for the upkeep of a particular parcel of property are held to be real covenants which 'touch and concern' land, and therefore, run with the land." *Queen's Grant*, 628 S.E.2d 902, 368 S.C. 342 (Ct. App. 2006), *citing Epting v. Lexington Water Power Co.*, 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

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deeded to and owned by the Association—otherwise there would be nothing for the Declaration to "touch and concern" and no mutuality which would justify assessment. As discussed in Plaintiffs' Trial Brief, the Declaration as a whole unequivocally manifests a plan of development that necessitates ownership by the Association of the common property which it was to assess members to maintain, in conformance with the law of restrictive covenants.

1. The Declaration as purportedly amended by the 1985 Modification requires that "Common Properties" must be properties deeded to the Association.

The Association argues that the Association does not have to own—or be deeded—property in order for it to be "Common Property." This is wrong. The 1985 Modification states, "Common Properties" is herewith amended by broadening the definition of Common Properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.[13]

The 1985 Modification is not a stand-alone term, nor is it a stand-alone document. It refers to and purports to amend the definition of "Common Properties" in the 1970 Declaration to broaden the types of properties that *may* become "Common Properties." The original 1970 Declaration limited the types of property that could become "Common Properties" to "land . . . deeded to the Association." The 1985 Modification broadened the definition "to include" boat

[13] Exhibit 3.

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channels, waterways, channel markers, and sea marsh open spaces, types of property that are not commonly understood to be "land."

The word "include" means "comprise" or "to contain" "as part of a whole."[14] And as the United States Supreme Court stated in *Federal Land Bank v. Bismarck Lumber Co.*,[15] "[t]he term 'including' is not one of all embracing definition, but connotes simply an illustrative application of a general principle." In this case, the phase "to include" adds waterways to the list of the types properties that *may* become "Common Properties," but does not change or delete the other mandatory requirements, all of which *must* be met. **The phrase "to include" does not change the overriding principle of the definition that "Common Properties" "mean and refer" to properties deeded to the Association.** After adding the 1985 Modification, the text of the Declaration would read:

> "Common Properties" shall mean and refer to those areas of land, *to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, South Carolina,* with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties."

Or, alternatively:

> "Common Properties" shall mean and refer to those areas of land which are deeded to the Association and designated in said deed as "Common Properties", *to include all boat channels, waterways, channel markers and salt marsh open areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, South Carolina.*

[14] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/include

[15] 314 U.S. 100 (1941).

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The 1985 Modification is unambiguous. It adds things to the list of things that *may* become "Common Properties." But it does not change *how* those things become "Common Properties." The only verb added to the definition of "Common Properties" by the modification is the verb "include" which introduces a list of four things added to the things that may become "Common Properties"—"boat channels," '"waterways," "channel markers," and "sea marsh open areas."

The only words in the Declaration as amended by the modification that tell <u>how</u> the named things become "Common Properties" are the verbs "deeded" and "designated." Under the Association's incorrect interpretation of the 1985 Modification, the modification not only added to the list of the types of property that may become "Common Properties," but expanded the assessment powers of the Association to allow it to assess its members to support properties in which neither the Association nor its members have a dedicated legal interest and which did not become subject to the jurisdiction of the Association in the manner required by Article II, Section 2(b) of the Declaration.

Importantly, the definition of "Common Properties," as purportedly amended by the 1985 Modification, did not change the requirement of the third sentence of the definition, which states:

> All Common Properties are to be **devoted to** and **intended for** the **common use and enjoyment of** the owners of the Properties, subject to the fee schedules and operating Rules adopted by the Association.

(emphasis added).

The Association has no authority to <u>devote</u> the navigable public waters of

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Braddock Cove to "the common use and enjoyment of the owners of the Properties . . . ." It has no authority to limit access to Braddock Cove in any way. **Braddock Cove is a public waterway.** Article XIV, Section 4 of the South Carolina Constitution states,

> All navigable waters shall forever remain highways free to the citizens of the State and the United States without tax, impost or toll imposed . . . .

If the first sentence of the definition of "Common Properties" is interpreted to mean the Braddock Cove waterways became "Common Properties" simply by being designated to be such, this designation under the first sentence of the definition violates the Association's obligation under the third sentence of the same definition. The Association cannot limit the use of property it does not own to "the common use and enjoyment of the owners of the Properties" without authorization from the owner of that property. The State of South Carolina devoted this property to the public long ago.

The unambiguous language of the Declaration as it would be amended by the 1985 Modification requires that "Common Properties" be properties deeded to the Association and devoted to its members. The Association has not and cannot meet these requirements with regard to Braddock Cove, a public waterway.

2. The 1985 Modification must be construed in context with the requirements of the 1970 Declaration.

If there are two reasonable interpretations of the language used with restrictive effect, courts will adopt the interpretation that is least restrictive.

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Covenants restricting land are strictly construed with all doubts being resolved in favor of the free use of property and against restrictions.[16]

The 1985 Modification must be interpreted in light of the 1970 Declaration as a whole.[17] The 1985 Modification states that—except for amending the definition of "Common Properties" to include the Braddock Cove waterways—"the Covenants and Restrictions applicable to the Association ***are herewith republished and reaffirmed***. . . ."[18]

It is clear from the Declaration as a whole that "Common Properties" must be properties deeded to the Association and devoted to the common use of Owners. Article IV has three sections that list in detail the rights of the developer, the Association, and Members in the Common Properties. None of these rights can exist with respect to property that is not owned by the one with the right.

(a) Members do not have an appurtenant easement in the Braddock Cove waterways.

Article IV, Section 1 of the 1970 Declaration automatically grants Members of the Association "a right and easement of enjoyment in and to the Common Properties and such easement shall be appurtenant to and shall pass with title of every Lot and Dwelling Unit." Legally, an easement may be granted only by the owner of the property to which it pertains. The Association's interpretation of the 1985 Modification would continue the burden of assessments to maintain

[16] *Sea Pines Plantation v. Wells,* 294 S.C. 266 (1987).

[17] *Id.*

[18] Exhibit 3, emphasis added.

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property, but without the appurtenant right granted by the Declaration to Owners to enjoy that property. The right to control use of the Braddock Cove waterways belongs to its owner, the State of South Carolina.

Under the plan of the Declaration, the Association's authority to levy assessments is paired with an easement in the property supported by the assessment that is appurtenant to each Owner's lot and dwelling unit. It is a breach of the terms of Article 1, Section 1—and a failure of consideration—for the Association to assess Owners to support properties in which they have no appurtenant easement. The Declaration should not be interpreted to authorize the Association to impose assessments that result in the breach of a promise made to Owners in another Article of the Declaration.

(b) The Association does not have the authority to mortgage the Braddock Cove waterways.

Article IV, Section 3(a) of the 1970 Declaration gives the Association the right to mortgage the "Common Properties." But only an owner or one authorized by the owner has the right to mortgage real property, and the Association does not own the Braddock Cove waterways.

(c) The Association does not have the authority suspend Owners' right to use the Braddock Cove waterways.

Article IV, Section 3(c) of the 1970 Declaration gives the Association the right to suspend non-assessment-paying Owners from use of the Common Properties. Owners' rights to use the Braddock Cove waterways are granted by

the State of South Carolina. The Association may not deny their access to public waterways.

(d) The Association does not have the authority to charge fees for the use of the Braddock Cove waterways.

Article IV, Section 3(d) of the 1970 Declaration grants the Association the authority "to charge reasonable admission and other fees for the use of Common Properties." But the Association may not charge for the use of public waterways.

(e) The developer did not have the authority to grant utility easements on the Common Properties.

Article IV, Section 3(e) of the 1970 Declaration gave the developer the right to grant utility easements on the Common Properties. But the developer cannot grant easements on property the developer does not own.

(f) A covenant to pay assessments to support property in which Owners have no property interest does not run with their land.

Article VIII, Section 1 of the 1970 Declaration states the intention that its covenants run with the land to bind future Lot and Dwelling Unit owners in the South Beach development. If the Declaration is interpreted to mean that the Association may levy assessments to support land in which its members have no dedicated property interest, the covenant to pay assessments to dredge Braddock Cove does not touch and concern their land. Consequently, it does not run with their land. This result would violate the central purpose of the Declaration.

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In short, the Association's argument that Common Properties do not have to be properties deeded to the Association is contrary to (1) the unambiguous language of the definition of "Common Properties" as it would be amended by the 1985 Modification, (2) every reference to the rights and powers of the developer, the Association, and Members granted with respect to Common Properties by the Declaration, and (3) the central purpose of the plan established by the Declaration that its covenants run with the land. Indeed, the authors of the 1985 Modification must have believed ownership was necessary, because they attempted to "paper the file" by obtaining a quitclaim deed purporting to convey an interest the Braddock Cove waterways to the Association in an unsuccessful effort to satisfy the requirements of Article I, Section 1(c), and Article II, Section 2(b).

C. Dredging is <u>not</u> construction, according the Association's "compact, [or] stipulation of agreement."

Unabashedly omitting important words from its quotation of the Declaration, the Association argues that "dredging" is "construction" and so therefore it has the authority to assess for it. Context is important, so below is the actual quote from the Declaration about Special Assessments. It is clear that the construction must pertain to capital improvements on and additions to the common property:

> Section 4. <u>Special Assessments</u> **<u>for Improvements and Additions</u>**. In addition to the annual assessments authorized by Section 3 hereof, the Association may levy special assessments, for the purpose of

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> defraying, in whole or in part, the cost of any construction or reconstruction, **unexpected** repair or replacement **of a described capital improvement upon the Common Properties,** including the necessary fixtures and personal property related thereto or addition to the Common Properties . . . [19]

Setting aside for a moment the reality that the State's navigable waterways do not constitute "Common Properties," the Association also fails to explain how the removal of silt could be considered an "addition" to or "capital improvement upon" a tidal creek. Or "unexpected."

The Association picks an outlier definition from *Blacks Law Dictionary* to argue that "to construct" *might could* mean "make ready for use."[20] This is so broad it is nonsensical, particularly in the Declaration's context of "construction" as "of a described capital improvement upon the Common Properties." Under the Association's "make ready for use" argument, nearly any activity could be interpreted as "construction": setting a table; reupholstering a chair; writing a brief. The Court should disregard this fiction.

The Association next refers to language in a federal regulation that establishes classification categories of businesses for regulatory purposes. "Dredging" is an activity—not a business. Classification categories of businesses for purposes of government regulation are not definitions which control private parties.

Similarly, the Association points to the word "construction" used at certain

[19] Exhibit 1, p. 7 (emphasis added).

[20] Predictably, Merriam-Webster defines "construct" as "to build". https://www.merriam-webster.com/dictionary/construct

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times in the 113-page permit document. But when referring to the dredging activities it authorizes, the permit variously refers to "activity authorized by this permit," "permitted activity," "work," "dredging event," "dredging operations," "dredge and disposal activities," and "dredging activities." The permit, and the government, are not actually defining dredging as "construction" as the term is used in the Declaration, which is a private contract among private parties and must be interpreted with its ordinary meaning. Instead, the Association is cherry-picking the word "construction" out of disparate contexts, trying to cobble together a definition that suits its momentary argument.

The theme song here is that the words within the Declaration matter, and those words cannot be construed to legitimize "dredging" as an "addition to" or "capital improvement on" the State's tidal waterways.

D. Plaintiffs' "Procedural" Challenges to the 1985 Modification—which they do have standing to make—have merit. They are based on the unambiguous terms of the Declaration's amendment provision.

The Association next argues that Plaintiffs lack standing to assert their challenges to its actions. But the challenges Plaintiffs make are based on the contract between Plaintiffs and the Association—the same contract that the Association claims gives it the right to levy dredging assessments. Apparently, the Association believes that the provisions that it claims authorize it to assess for dredging are enforceable, but that the "procedural" provisions relied upon by Plaintiffs are not. Notably, the terms which the Association mischaracterizes as

"procedural" are actually ***substantive***. They are conditions precedent to the effectiveness of amendments. If conditions precedent to effectiveness are not satisfied, there is no contract. All are parties to this lawsuit are parties to the Declaration—the contract at issue here. Any party to a contract has standing to assert breaches of that contract against the other party and to obtain a declaration of its rights and obligations under that contract, pursuant to the Declaratory Judgment Act. This argument by the Association is odd and without merit.

Similarly, the fact that Plaintiffs bought their property with notice of the Declaration does not strip them of their right to enforce its terms. The issue is not whether Plaintiffs had notice of the Declaration. Instead, the issue here is what the Declaration authorizes. Plaintiffs seek a determination of whether the Association has the authority to assess them, including to "maintain" the State's waterways, when Association owns no Common Properties. In short, this case involves questions of Plaintiffs' obligations under the Declaration, not whether they have notice of its existence.

Plaintiffs' argument on the 60-day notice requirement in the amendment provision is not that they did not have notice. It is that the law of South Carolina requires amendment provisions affecting restrictive covenants to be strictly construed. If the requirements are not followed, the resulting amendment is invalid. Thus, the court in *Kinard v. Richardson* held that where the original Declaration required any amendment to be executed by a majority of owners, a

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purported amendment without the owners' signatures was not valid.[21] Similarly, without the 60-day notice which is unambiguously required by the amendment provision in the Declaration at issue here, the resulting 1985 Modification is without effect. This is true for any contract. *See Hynes Family Trust v. Spitz*, 384 S.C. 625, 629, 682 S.E.2d 831, 833 (Ct. App.2 009) ("Restrictive covenants are construed like contracts. If a contract's language is unambiguous "the court's only function is to interpret its lawful meaning and the intent of the parties as found in the agreement.'")[22] Nothing could be more unambiguous than the requirement stated in Article VIII, Section 1 of the Declaration that

> no such agreement to change shall be effective unless [the conditions precedent are satisfied].[23]

"Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time it was made, rather than the subjective, after-the-fact meaning one party assigns to it."[24]

The Association also asks this Court to misread the Declaration's Article II requirements for adding property to the jurisdiction of the Association, claiming that these provisions only apply when adding property subject to assessment. This argument ignores the plain language of the Declaration, which makes no distinction between residential and common property—it simply requires a

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[21] 407 S.C. 247, 754 S.E.2d 888.

[22] *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 577 (2014).

[23] Exhibit 1.

[24] *N. Am. Rescue Prods., Inc. v. Richardson,* 411 S.C. 371, 378 (2015).

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supplemental declaration in order to "add [property] ***to the plan of these covenants***."[25] The whole purpose of the "plan of these covenants" is to distinguish property subject to assessments from property supported by assessments. Both must be added to the "plan of these covenants," as Article II requires. Significantly, Article V, Section 11 of the Declaration exempts "Common Properties" from the article's assessment and lien obligations—demonstrating that common properties are indeed intended to be subject to the plan of the covenants.[26]

Finally, the Association has no legitimate response to the clear invalidity of the 1985 Modification: although the document states that it was enacted unanimously, the parties here have stipulated that Plaintiff Trager did not vote in favor of it.[27] As such, it is false on its face and void.

E. Plaintiffs' claims for prospective relief are not time-barred.

The Association wrongly argues that Plaintiffs' claims are time-barred because the statute of limitations is three years and the Association's governing declaration was recorded in 1970, modified in 1985, and dredging assessments were levied in 1986, 2013, and 2017. However, Plaintiffs' claims are not based on the dates the documents were recorded or the dates on which different actions were taken under them in the *past*. The 1970 Declaration, the Association's

[25] Exhibit 1, Art. II § 2.

[26] Exhibit 1, pp. 11-12.

[27] Stip. ¶ 16.

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governing declaration, is living document. The Association continues to levy annual assessments, and it continues to claim it has the authority to levy dredging assessments in the future.[28] Its authority to levy assessments is governed by documents that have been in effect for many years, but all assessments levied by the Association based on the authority conferred by these documents must still comply with their terms. In this case, Plaintiffs seek prospective relief only—a declaratory judgment that the Association has no authority to levy assessments in the future because it owns no "Common Properties." Plaintiffs' claims are not time-barred. *See, e.g., Queen's Grant,* 628 S.E.2d at 902, 368 S.C. at 342 (finding developer had not shown that the defenses of laches and estoppel applied to claims against it for prospective relief); *Seabrook Island Property Owners Ass'n v. Pelzer*, 356 S.E.2d 411, 292 S.C. 343 (Ct. App. 1987) (granting to homeowner prospective relief on validity of assessments, but finding homeowner was not entitled to a refund for past assessments paid).

[28] Exhibit 33 (Spring 2023 Association newsletter: "In future dredges, we will be called upon to participate both in the application, and in the finance process."; "The application for the future dredge is already in process and will be proceeding with the Corps of Engineers, seeking to enable the dredge as needed in the future."); Exhibit 35 (Fall 2022 Association newsletter: "It is the intention of this board to remain active in future dredge discussion . . . .").

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F. "Votes" are not the same thing as "ratification."

In this section of its trial brief, the Association peppers its previous arguments with the word "ratification," in an attempt to lend credence to its notion that the Association can defy both the contract and the law simply by obtaining a vote. As Inigo Montoya once said to the Sicilian, "You keep using that word. I do not think it means what you think it means."[29] The Association argues that "[a]ny possible procedural flaws are of no consequence because the Members' vote to approve the Modification ratified the action taken by the Association." (Assoc. Tr. Br. p. 19). The problem with the Association's argument is that the Members' vote to approve the 1985 Modification did not ratify an act of the Association. **It *was* the act of the Association.** Ratification is an agency law doctrine that allows a principal who has authority[30] to approve the act of an unauthorized agent. The doctrine of ratification does not apply unless there is an agency relationship and unless the principal had authority to take the action ratified in the first place. Under South Carolina law, "[r]atification . . . means the express or implied adoption and confirmation by one person of any act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent."[31]

Here, among other problems, there is no agent. The principal is the Association and the Association's act to amend the Declaration requires the

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[29] "The Princess Bride." Twentieth Century Fox Film Corporation, 1987.

[30] Notably—***the principal must himself have authority***, the power to take the act in the first place.

[31] *Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E. 2d 801, 803 (1989).

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affirmative vote of three quarters of a quorum of its members. The authority of the Association to act through the vote of its members is limited by the terms of the Declaration itself. The Declaration states that the Association can only amend "covenants" and that it can only amend covenants if conditions precedent to the effectiveness of amendments are satisfied. These are not "procedural flaws of no consequence," as the Association characterizes them, but substantive requirements of a lawful contract that limit the Association's amendment authority. The Association cannot simply ignore the limitations on its authority by the Declaration based on the vote of members approving an amendment the Association has no authority to make. A vote of members that is an act of the Association cannot waive compliance with the terms of Declaration. As the Court stated in *Queens Grant,* an amending party "must strictly comply with the amendment procedure set forth in the declaration of covenants."[32]

Further, the law of agency in South Carolina is that a principal cannot ratify an unlawful act.[33] Purported modification to subject the State's waters to the Association's jurisdiction was unlawful and in breach of contract. The law of real property in South Carolina is that covenants and restrictions must be amended in strict conformance with the process for amendment, or the resulting amendment is void.[34] Thus—even if this were an agency situation involving the doctrine of

[32] 628 S.E.2d 902, 907.

[33] *Lincoln*, 386 S.E.2d 801 ("an agent's act . . . which is illegal, cannot be ratified.").

[34] *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) (holding that an amendment to covenants was void because it was not executed in conformance with strictly construed

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ratification—the members could not authorize a violation of the covenants or amend the covenants in a manner contrary to the express requirements. Here, as discussed at length in Plaintiffs' Trial Brief, the Declaration contains an amendment provision, as well as other clauses directly bearing on common property, which must be strictly observed and which do not authorize the action purportedly taken by the Members vote on the 1985 Modification. No amount of shareholder voting can empower a corporation to take an action which is otherwise prohibited.

G. *Catwalk* does not apply here.

At this point in its brief, the Association is well into legal "speed dating" arguments, cycling quickly through ideas without depth or commitment. None of these arguments are marriage material, or judgment material.

Foremost among these is the *Catwalk* argument: that a prior, different case, about different issues, acts as estoppel to these Plaintiffs in this case. This argument is simply wrong.

This lawsuit concerns residential property and the question of whether the Association has authority to assess residential property owners for dredging public property. In contrast, *Catwalk* was a declaratory judgment case brought by Vacation Inn, LLC, one of three plaintiffs in this case, along with other owners of ***commercial properties*** in South Beach. The difference is important. In *Catwalk*,

amendment provisions); *Brown v. Bass*, 276 S.C. 211, 213, 277 S.E.2d 480, 480 (1981) (purported amendment invalid when not imposed in accordance with covenants).

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plaintiffs claimed that their commercial properties were exempted from the 1970 Declaration by a different document, a 1973 declaration. This was because the 1973 declaration contained covenants applicable only to commercial properties in South Beach ("1973 Commercial Covenants").

The only issue in *Catwalk* was whether the terms of the 1973 Commercial Covenants exempted the *Catwalk* plaintiffs' commercial properties from covenants in the Developer's 1970 Declaration, the covenants at issue in this case. The court in *Catwalk* did not decide any right or obligation of the *Catwalk* plaintiffs under the 1970 Declaration, only that the *Catwalk* plaintiffs were members of the Association "with all rights and obligations of membership."[35] The specifics of those rights and obligations were not decided.

1. These Plaintiffs' claims are different.

In this case, Plaintiffs seek a declaratory judgment that the Association has no authority under its governing documents to levy annual or special assessments to dredge Braddock Cove because it owns no "Common Properties." Plaintiffs' claim in this case is based on the interpretation of four recorded documents:

1. The Association's certificate of incorporation.
2. The Declaration.
3. The 1985 Modification.
4. The 1985 Quitclaim Deed.

[35] Exhibit 27, *Catwalk* Order, p. 8.

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The plaintiffs' claim in *Catwalk* was based on the interpretation of the 1973 declaration of commercial covenants that applied to commercial properties in South Beach. The claim here and the claim in *Catwalk* are different claims involving the interpretation of different documents.

Moreover, the court in *Catwalk* did not decide whether the Association owned any "Common Properties." It did not decide the effect of the 1985 Modification on the terms of the Declaration and it did not decide whether the Association had the authority to levy assessments to dredge Braddock Cove. It only decided that those plaintiffs "are members of the Association, with all rights and obligations of membership."[36] ***This*** case is about what those "rights and obligations" are.

The Association takes the court's ruling in *Catwalk,* that the *Catwalk* plaintiffs "are members of the Association, with all rights and obligations of membership," and jumps to the incorrect conclusion that the "rights and obligations" of membership include the obligation to pay assessments when the Association has no "Common Properties." The Association claims that its interpretation of the Declaration is correct because the court in *Catwalk* held that the *Catwalk* plaintiffs' property was subject to the Declaration. But the *Catwalk* court interpreted the 1973 Declaration of commercial covenants, not the Declaration at issue in this case. The assessment terms of the 1970 Declaration have never been interpreted by a court.

[36] Exhibit 27, p. 8.

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In sum, the court's decision in *Catwalk* has no preclusive effect on any of Plaintiffs' claims in this case and has no relevance to this case as precedent.

2. The *Catwalk* plaintiffs were different.

Collateral estoppel only bar parties who were also parties to the previous case.[37] Plaintiffs Stroup and Trager were not parties in *Catwalk* and therefore are not bound by the decision in that case.

Moreover, the *Catwalk* appeal decision is unpublished and explicitly admonishes that it should not be cited or relied upon as precedent:

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.[38]

As such, the *Catwalk* case cannot, and should not, be used to decide these Plaintiffs' claims in this very different lawsuit.

3. The *Catwalk* ruling was different.

In its brief, the Association mischaracterizes the issues decided in *Catwalk*, which are different from those here. The misleading implication is that the *Catwalk* plaintiffs were challenging the terms of the covenants in the Developer's 1970 Declaration. That is wrong. The *Catwalk* plaintiffs were challenging the intent of the ***1973*** Declaration, which states that it contains the only covenants applicable to commercial property. Thus, the *Catwalk* plaintiffs argued that their commercial properties were not also subject to the 1970 Declaration. The meaning of the 1970

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[37] *Ex parte Allstate Ins. Co.*, 339 S.C. 202, 206–207, 528 S.E.2d 679 (Ct. App. 2000).

[38] Exhibit 29, p. 1.

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Declaration was not at issue. As the *Catwalk* plaintiffs stated on page 9 of their motion for summary judgment in that case,

> The properties lying within South Beach Marina Village are all commercial properties. By the express language of the [1973] Commercial Covenants, the [1973] Commercial Covenants are: …"the sole *applicable* covenants restricting Commercial property…."

(emphasis added). The court in *Catwalk* recognized that only their applicability to commercial properties, not the meaning of any of the covenants in the 1970 Declaration, was at issue in that case, stating:

> The dispositive question before the Court, raised by the parties Motion and Cross Motion for summary judgment, is whether Commercial Use Covenants recorded in 1973 ***exempt Plaintiffs' properties*** from the obligations of 1970 Covenants for South Beach, Sea Pines Plantation, Hilton Head Island, South Carolina.[39]

The *Catwalk* court held that the commercial properties at issue were subject to both sets of covenants (*i.e.*, both the 1973 Commercial Covenants and the 1970 Declaration). The court order's findings were limited to this single issue:

> The Court finds Plaintiffs properties are encumbered by and subject to the 1970 Covenants and the 1973 Commercial Use Covenants
>
> [and]
>
> The Court finds that as a matter of law Plaintiffs' properties are subject to and encumbered by the 1970 Covenants and the 1973 Commercial Covenants. Accordingly, Plaintiffs are members of the Association, with all rights and obligations of membership.[40]

In other words, the court in *Catwalk* was deciding the developer's intent as to

[39] Exhibit 27, p. 1 (emphasis added).

[40] Exhibit 27, pp. 1, 8.

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which covenants were meant to apply to the *Catwalk* plaintiffs' commercial properties; it was <u>not</u> construing or deciding the substance of the individual covenants within the 1970 Declaration. Both the circuit court and the Court of Appeals restricted their analysis to this question.[41]

4. The Association mischaracterizes arguments in *Catwalk*.

The Association argues that, in *Catwalk,* those plaintiffs, including Vacation Inn (one of the plaintiffs here), specifically challenged the right of the Association to levy dredging assessments. This argument is misleading and wrong. Tellingly, the word "dredge" (and its variations) is not anywhere in the court's order[42] in *Catwalk*—because assessments for dredging were not at issue. Instead, the language relied upon by the Association for this argument was an assertion in a legal brief that the Association had never before attempted to levy assessments for dredging ***against those plaintiffs' commercial properties***.[43] In the past, those commercial property owners who chose to contribute to dredging had done so voluntarily (in the amount of $787,000)—not under assessment by the

[41] *See Catwalk, LLC v. Sea Pines South Beach Owners' Association, Inc.* Op. No. 2018-UP-0069 (holding that because the "1970 Covenants were specifically included in subsequent deeds of conveyance," the plaintiffs' title is subject to them; and noting "appellants' titles, with the exception of South Beach Swimming Pool, Inc., trace back to a 1984 deed of conveyance between Sea Pines Plantation Company and South Beach Marina Village, a partnership. The 1984 deed specifically incorporates the 1970 Covenants and the 1973 Commercial Covenants. The property owned by South Beach Swimming Pool, Inc. was conveyed by a 1987 deed which specifically incorporated the 1970 Covenants and 1973 Commercial Covenants.").

[42] *See* <u>Exhibit 27</u> (*Catwalk* order).

[43] The Association's Motion to Dismiss, Exhibit 6, pp. 3–14.

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Association.[44] This point was meant as an example of why the commercial properties were intended to be exempt from the 1970 Covenants. The discussion was largely part of the *Catwalk* plaintiffs' affirmative defense that because the Association had not attempted to levy assessments on their commercial properties during the more than 40 years of the Associations' existence, the Association was time-barred from claiming that the *Catwalk* plaintiffs' properties were subject to the Association's jurisdiction. The Court dismissed this defense as a matter of law.[45] A decision ruling on a statute of limitations defense is not a decision determining the Association's authority to levy dredging assessments.

In sum, the Association's collateral estoppel argument fails because the present issue was not litigated in *Catwalk*, was not determined in *Catwalk*, and was not necessary to support the judgment in *Catwalk*.

H. *Res judicata* or claim preclusion to not apply here.

The Association's *res judicata*/claim preclusion argument is similar to its collateral estoppel argument, but even weaker. Summarized, the Association claims that this case "might have been litigated" in *Catwalk*, and that Plaintiffs Stroup and Trager somehow were in privity with Vacation Inn, LLC, a decade ago when *Catwalk* was litigated.

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[44] *Catwalk*, Mot. for Summary Judgment, p. 9 ¶ 23.

[45] Exhibit 27, *Catwalk* order, pp. 8–9.

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1. *Catwalk* is still different.

As an initial matter, all of the arguments above apply here: *Catwalk* was a different case, with different issues, with different parties, that made unrelated rulings. The Association's argument should be rejected for the same reasons that the collateral estoppel argument should be rejected.

2. Stroup and Trager had no involvement in *Catwalk*.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties.[46] Plaintiffs Stroup and Trager were not parties in *Catwalk* and therefore are not bound by the decision in that case. Moreover, it is ridiculous to argue that Stroup and Trager enjoyed a full and fair opportunity to litigate this issue in the *Catwalk* case, as would be required for claim preclusion. There is no evidence they even were aware of that lawsuit, much less involved in any way.

The Association argues that Plaintiffs Stroup and Trager are barred by *Catwalk* because they somehow are in privity with Vacation Inn, LLC. In support of this odd proposition, the Association cites *Nelson v. QHG of S.C., Inc.*[47] The *Nelson* case was a personal injury case involving injuries to a minor. The minor was represented by a guardian ad litem. The court ruled in favor of the defendant. A second guardian ad litem representing the same minor brought a second case

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[46] *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999); *see also Johns v. Johns,* 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992) (even when the defendant meets all of the required elements, *res judicata* will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies.").

[47] 354 S.C. 290 580 S.E.2d 171 (Ct. App. 2003).

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asserting the same claim. The court in *Nelson* held that the two guardians were in privity because they both represented the same minor. In effect, both were the minor for purposes of the claim in both cases. As the court stated:

> The identity of the guardian changed, but the basic facts underlying the cause of action remained identical and required the presence of the child. There is no question that a minor ward and her guardian are in privity with each other.
>
> [and]
>
> "Privity" means one so identified in interest with another that he represents the same legal right.[48]

Here, there is no connection between Plaintiffs Stroup and Trager and the cause of action in *Catwalk*. The cause of action in *Catwalk* was a claim under a 1973 declaration of commercial covenants applicable to commercial properties in South Beach. Plaintiffs' cause of action in this case is a claim under the 1970 Declaration. Plaintiffs Stroup and Trager own no commercial property in South Beach, and they have no legal connection to the document that was the subject of the *Catwalk* plaintiffs' claim. Plaintiffs Stroup and Trager are not in privity with Vacation Inn, LLC.

3. *Res judicata* principles do not apply to declaratory judgment cases.

In addition, *Catwalk* was a declaratory judgment case. Although estoppel and *res judicata* sometimes may bar claims that should have been made in a previous case, if the previous case was a declaratory judgment action, *res judicata*

[48] *Id.*, 354 S.C. at 309, 310.

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only bars relitigating issues actually decided among the parties in the previous case. As the court stated in *Catawaba Indian State Nation v. State*:

> Although *res judicata* applies to issues that were previously raised or could have been raised in the prior action, declaratory judgments are distinguishable. **As one legal treatise has observed, *res judicata* does not apply to declaratory judgments, but only to issues *actually decided* by the court…. Unlike other judgments, a declaratory judgment determines only what it actually decides and does not preclude other claims that might have been advanced**.[49]

The only issue decided by the court in *Catwalk* was that the 1973 declaration of commercial covenants applicable to the *Catwalk* plaintiffs did not exempt them from the 1970 Declaration at issue here. The scope of the court's holding in *Catwalk* was unambiguously stated in the court's decision. The order stated:

> The dispositive question before the Court, raised by the parties in the Motion and Cross Motion for Summary Judgment, is whether Commercial Use Covenants recorded in 1973 exempt Plaintiffs' properties from the obligations of 1970 Covenants for South Beach, Sea Pines Plantation, Hilton Head Island, South Carolina.[50]

The order's findings were limited to this single issue:

> The Court finds that as a matter of law Plaintiffs' properties are subject to and encumbered by the 1970 Covenants and the 1973 Commercial Covenants. Accordingly, Plaintiffs are members of the Association, with all rights and obligations of membership.[51]

The order's statement of facts does not mention common property, dredging, or assessments—because they were not at issue. The Court in *Catwalk* did not decide

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[49] 407 S.C. 526, 534–540 (2014) (emphasis added).

[50] Exhibit 27, p. 1.

[51] Exhibit 27, p. 8.

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any issue involved in this case and this Court should reject the argument that *res judicata* or claim preclusion apply here.

I. The Association's waiver argument fails.

The Declaration contains an anti-waiver and anti-estoppel provision:

> [F]ailure by the Association **or any Owner** or the Company to enforce any covenant or restriction herein contained for **any period of time shall in no event be deemed a waiver or estoppel** of the right to enforce same thereafter.[52]

This provision forecloses the Association's waiver, estoppel, and similar arguments.

Even so, the Association improperly argues that Plaintiffs waived any right to complain about the Covenants because, when they bought property, Plaintiffs knew that they were subject to covenants. If this were true, no property owner ever could challenge a property owners' association's interpretation of covenants, or any assessment under covenants. Plainly, that is not the law.

Again, the issue here is not whether Plaintiffs' properties are subject to certain covenants. The issue is what those covenants mean. And whether the Association is interpreting the covenants correctly and in accordance with South Carolina law by trying to assess these Plaintiffs to pay for dredging public property, when the governing documents restrict assessments to Common Properties.

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[52] Exhibit 1, p. 15, Art. III § 3 (emphasis added).

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So, too, with the Association's "democratic process" argument. The Association now contends that, because there were certain votes years ago, Plaintiffs may not contest future dredging assessments of the Association. If true, why hold any votes after the first one? The Association seems to believe that because—sometimes—past votes approved certain assessing for dredging, all future dredging actions are blessed and approved. Clearly that is not true. Also untrue is the Association's argument that because Stroup may have voted previously in favor of a particular dredge, he has waived his right to contest future dredge assessments. A vote in one election is not waiver of all future rights on a subject, or on a legal issue. Even the Association does not believe that past votes bind the parties now, as shown by the fact that the Association itself refused (without a member vote) to participate in the 2023 dredge.[53] As in the past, the 2023 dredge went forward without the Association.

J. Equitable estoppel does not bar Plaintiffs' claims.

Darting to the next argument, the Association argues that equitable estoppel bars Plaintiffs' claims. The Association acknowledges that this is nearly identical to its waiver argument (above). The Association's argument fails for the same reasons as discussed above, including the explicit provision in the

[53] Stip. ¶ 23.

Declaration that failure to enforce a particular right "shall in no event be deemed a waiver or estoppel."[54]

The Association argues that Plaintiffs are not entitled to a declaratory determination of their obligations because of their past participation in Association activities and because the Association has at certain times collected assessments under its interpretation of the Declaration without objection from Plaintiffs.

But Plaintiffs' participation in Association activities, the Association's interpretation of its governing document, and the lapse of time are irrelevant in determining the meaning of an unambiguous, written, recorded contract. The terms of the Declaration governing the Association's assessment authority have never been interpreted by a court. The fact that the Association may have been collecting assessments under an erroneous self-interpretation of its governing documents for years does not change the legal meaning of those documents. The Association cannot amend the terms of an unambiguous contract by collecting assessments in violation of its terms for any length of time.

A property owners' association with a fiduciary obligation to administer its governing documents in accordance with their terms cannot substitute its own interpretation for their legal meaning by estopping property owners from questioning its interpretation. This is exactly the kind of case declaratory

[54] Exhibit 1, p. 15, Art. III § 3 (emphasis added).

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judgment actions were intended to address. Estoppel-based defenses do not apply to cases involving the interpretation of unambiguous contracts.

Rodarte v. Univ. of S.C.[55] involved a claim by plaintiff football fans that they were entitled to particular parking places for football games under their written agreement with the university's booster club. The plaintiffs claimed that the university was equitably estopped from asserting its interpretation of the agreement by offering evidence of conversations with University officials that supported plaintiffs' interpretation of the agreement. The court held that equitable estoppel cannot be used to change the terms of an unambiguous written agreement, stating:

> Allowing Respondents' equitable estoppel claim to go forward—with the introduction of parol evidence that would entail—**would be tantamount to permitting a party to convert an unambiguous contract into an ambiguous one based on little more than "the subjective, after-the-fact meaning one party assigns to it**."[56]

In this case, the agreements among the Association and its members are agreements recorded in Beaufort County land records. The Association and Plaintiffs agree that they are bound by the lawful terms of those agreements as recorded. The agreements mean what they say and must be interpreted by applying established principles of contract interpretation:

> Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was

[55] 799 S.E.2d 912, 419 S.C. 592 (2017).

[56] 799 S.E.2d at 918, 419 S.C. at 604 (citations omitted, emphasis added).

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> made, **rather than the subjective, after-the-fact meaning one party assigns to it**.[57]

A party asserting an equitable estoppel defense must show that it lacked knowledge of the truth of the *facts* in question and that it relied to its detriment on the conduct of the party it seeks to estop. The Association's argument that Plaintiffs are estopped from questioning its authority to levy assessments ignores the "lack of knowledge" requirement entirely and stands the "reliance" argument on its head. As to knowledge, the Association is charged with knowledge of the legal meaning of its recorded governing documents:

> To succeed on a claim for equitable estoppel, a party must prove "lack of knowledge, and the means of knowledge, of the truth as to the facts in question." . . . However, an unambiguous contract is by definition capable of only one reasonable interpretation.[58]

As to reliance, any acts of Plaintiffs that were consistent with the Association's interpretation of its dredging authority could not possibly have been relied on by the Association to its detriment. And here, Plaintiffs seek only prospective relief, not reimbursement for past assessments. The Association has no right to rely on an expectation that it can collect unauthorized assessments in the future.

Moreover, the Association's argument here is conjectural and devoid of any citation or evidence. The Association speculates about unnamed owners and why such owners may have bought property in South Beach since 1985—without any

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[57] *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (S.C. 2015) (emphasis added).

[58] *Rodarte*, 799 S.E.2d at 918, 419 S.C. at 604 (S.C. 2017).

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evidence at all. The Association speculates that Plaintiffs may have somehow benefited from past dredges—again, without any evidence in support. The Association does *not* explain why the few members who live on the water should be able to charge everyone in the community to benefit the property of a few. Nor does the Association explain why a few members who want to support dredging should be permitted compel *everyone* to support their chosen cause. Indeed, **all members remain free to support dredging**; they just cannot use the power of the Association to force each and every one of their neighbors to pay for their pet cause.

"Prejudice to the other party is an essential element of equitable estoppel"[59]—but the Association proves no prejudice at all, least of all to the Association itself. Again, if this were so important to everyone, why would the Association have refused to participate in the 2023 dredge? The reason is clear: because the Association's participation is *not* important, and the Association has offered no evidence that it is. Instead, even without the Association's participation, dredges go forward.[60]

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[59] *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384 (S.C. 1991).

[60] Stip. ¶¶ 23, 24, 25 ("Harbour Town Marina and South Beach Marina each have been independently, privately dredged without the support or participation of the Association or SIDA.").

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K. The derivative claims are properly asserted.

Zig-zagging dizzily, the Association next challenges Plaintiffs' ability to bring derivative claims. However, S.C. Code § 33-31-304 states that challenges to *ultra vires* acts may be brought by derivative proceedings:

> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, **or by a member or members in a derivative proceeding**.[61]

Plaintiffs are members of the Association. Plaintiffs seek prospective relief only. No third-party rights are involved. Before filing suit, Plaintiffs demanded that the Association's board of directors stop the *ultra vires* activities, without success.[62] In the Verified Complaint, Plaintiffs have asserted a cause of action regarding the *ultra* vires acts, claiming, "The Association's actions described above are *ultra vires*, including without limitation under S.C. Code § 33-31-304 *et seq*. and other applicable law."[63] As such, the derivative claims are appropriate and the requirements have been satisfied. Plaintiffs request that the Court enjoin the Association's *ultra vires* acts.[64]

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[61] S.C. Code § 33-31-304(b) ("Ultra vires") (2024 ed.) (emphasis added); *see also* Rule 23(b)(1), SCRCP.

[62] Stip. ¶ 40; *see also* Compl. ¶ 44: "The actions complained of herein have been and will continue to be to the detriment of the Association and its members."

[63] *See* Compl. ¶¶ 53–55.

[64] Association's "fair and adequate" argument misses the mark. As members, Plaintiffs are do indeed "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCP; Compl. ¶ 45. Plaintiffs' intent is to, *inter alia*, obtain a judicial declaration of members' rights under the documents and South Carolina law. South Carolina law is clear that even a single member may adequately make such a claim: "To hold otherwise would be to deprive a sole dissenting shareholder from seeking relief from another shareholder's wrongdoing." *The*

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L. The *ultra vires* claims are properly asserted.

Backtracking, the Association next acknowledges that S.C. Code § 33-31-304(b) allows derivative actions to challenge *ultra vires* acts.[65] Plaintiffs have done this, including in their Verified Complaint at pages 7–8 ("**DERIVATIVE STANDING**"), in the caption ("*each both individually and derivatively*"), on page 1 ("both individually and derivatively"), and in paragraphs 39, 40, 41, 42, 43, 44, 45 (*inter alia*). Moreover, Plaintiffs attached to the Verified Complaint (as Exhibit F) their derivative demand letter, which is incorporated into the Verified Complaint and allegations. The Second Cause of Action alleges an *ultra vires* claim and seeks injunctive and declaratory relief for such claims. This is more than sufficient to properly allege an *ultra vires* and derivative claim.

The statute allows derivative challenges to a "corporation's power to act,"[66] including enjoining future acts. And Plaintiffs' declaratory judgment claims appropriately ask the Court to declare the rights of the parties, including regarding potential future events. As such, the lawsuit is properly alleged and proven, and Plaintiffs request that the Court enter the requested relief in favor of Plaintiffs.

Boathouse at Breach Inlet, LLC v. Stoney, 6056, Appellate Case 2020-001203 (S.C. App. Apr 03, 2024).

[65] To the extent the Association challenges whether such claims were properly pleaded, the Association was required to bring such arguments as a Rule 12 motion at the outset of the case and has waived any such arguments.

[66] S.C. Code § 33-31-304(b).

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CONCLUSION

For these reasons, Plaintiffs requests that this Court issue a judgment declaring that (1) the Association may not legally assess Plaintiffs for dredging Braddock Cove's boat channels and waterways and enjoining the Association from levying assessments for this purpose and (2) the Association may not levy annual assessments on Plaintiffs until such time as it owns Common Properties, and enjoining the Association from levying annual assessments on them until such time as it owns Common Properties.

Respectfully submitted,

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Stanley S. Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; Peter Trager, and Vacation Inn, LLC, each both individually and derivatively, Plaintiffs, Vs. Sea Pines South Beach Owners' Association, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL CASE NO.: 2021-CP-07-01655 **SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.'S OPPOSITION TO PLAINTIFFS' TRIAL BRIEF**

Pursuant to the Consent Briefing Order, the Defendants submit this Brief in Opposition to the Plaintiffs' Trial Brief. This Brief will assist the Court in determining that the Association has the right to levy special assessments to dredge Braddock Cove, as well as the validity and enforceability of the 1985 Modification, which is not unreasonable, indefinite, nor violative of public policy. Further, the owners of properties in the Association have a property interest in maintaining the health of Braddock Cove. Finally, the rights of the Association to amend the definition of Common Properties and pay assessments to dredge Braddock Cove is support by S.C. Code Ann §33-31-302.

The rights of the Association were also confirmed in the *Catwalk* case filed by the Plaintiff Catwalk, LLC in 2014. In that case at paragraph 34 of the Complaint and Affidavits attached, Plaintiffs complain that the Association asserts that Plaintiffs are "obligated to pay assessments imposed" by the Association. That right was being contested. (Ex. 26, Par. 34, Aff. Par 12). In their Notice and Motion for Summary Judgment the Plaintiffs' (including Vacation Inn) owner,

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Robert Gossett, states that not until July 2013 did the Association ever seek to impose assessments on his properties, including those in the name of Vacation Inn. Gossett's statement about Association assessments on his properties in July 2013 was prompted by dredge funding discussions, which culminated with Members passing a dredge assessment at the September 2013 meeting. (See *Catwalk* Notice and Motion for Summary Judgment, Pars. 12-14, 16, 18, 20, and pp. 11-12, which was ex. 6 to the Motion for Summary Judgment filed by Sea Pines South Beach in this action). Thus, the issue of whether the Covenants gave the Association the right to impose assessments, including special assessments to dredge Braddock Cove was plainly put in issue in *Catwalk*. Judge Dukes, in *Catwalk*, ruled that the Plaintiff, Vacation Inn, LLC and its properties are not exempted from the Covenants but are instead encumbered by and subject to the Covenants, including amendments (Ex. 27). The Order provides that the *Catwalk* Plaintiffs assert that they are not members of the Association and have no liability for assessments made or imposed by the Association. (Ex 27, p. 2). The Order points out that the covenants at issue are the 1970 Covenants and Restrictions of SBOA dated 1970, AS AMENDED FROM TIME TO TIME. (EX. 27, p. 3 par 2). On page 5 of the Order Judge Dukes writes that the Plaintiffs contend that they are not subject to annual assessments OR SPECIAL ASSESSMENTS by the Association. (Ex. 27). On page 7 Judge Dukes states that the "1970 Covenants" provide for the creation of the Association and "grant the Association the Authority to maintain and administer common properties, and collect and disburse necessary assessments and charges." (Ex. 27, p. 7). The Court ruled the 1970 Covenants give the Association authority to maintain and administer the community. (Ex. 27, p. 8). Therefore, all of the arguments in their Pretrial Brief contesting the validity of the Covenants and the Modification were necessarily rejected by Judge Dukes Order (Ex. 27 and 28) and his ruling was upheld by the Court of Appeals (Ex. 29) and the Supreme Court (Ex. 30).

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The balance of this Brief will illustrate further why Plaintiffs' arguments are not valid and must be rejected.

I. Art 1 – Definitions are a part of the Covenants governing the Association members

Plaintiff asserts the Definitions are not Covenants so cannot be amended because the "covenants" are a mere subset of articles within the "Declaration of Covenants and Restrictions". The argument is baseless, and contradicted by the very language they cite as the definition of "the covenants". The last introductory paragraph on page 1[1] of the Covenants states:

> "the real property in Article II, and such additions thereto as may hereinafter be made pursuant to Article II hereof, is and shall be held, transferred, sold, conveyed, lease, occupied, , and used subject to the covenants, restrictions, conditions, easements, charges, assessments, affirmative obligations, and liens (sometimes referred to as "the covenants") hereinafter set forth. (emphasis added)

This language makes clear that everything that follows in the document is "a covenant", i.e. an agreement among the members of the Association. The First Article proceeding the above language is the Definitions section. The Definitions are the agreement, i.e. the covenant, by and among the parties as what certain terms in the Covenant mean and how they will be used. There is no assertion in the Declarations of Covenants that "the covenants" are an isolated subset.

On page 14 of their brief Plaintiffs claim the "the covenants" are only the restrictions and affirmative obligations, when the document never once says that, even in the alleged definitional language they cite above which includes the words "covenants" and "conditions" as items to sometimes be referred to as "the covenants". They assert only Articles V- "Covenant for Maintenance"; VI – Party Walls; and VII – Architectural Control, could possibly be "the

[1] Cited by Plaintiff on p. 14 of their Trial Brief

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covenants". However, Plaintiff contends Art. II is not a part of "the covenants" even though the section clearly outlines the property within the community and property that can be added to the community. Even though in that Article at § 2 (b) Other Additions in discussing the addition of property it provides:

> [T]he owner of property other than the Company who desires to add it to the "plan of these covenants" and to subject it to the jurisdiction of the Association….

According to the Plaintiff Article III – Membership and Voting Rights in the Association, is not a "covenant" despite that it defines in section 1 the Membership. In section 2 of the Art. III, it defines the voting rights. Similarly, per Plaintiff, Article IV is not a covenant even though it defines what is and what is not property rights in the Common Properties. Likewise, they would have the Court believe Article VIII – General Provisions that outlines the duration of the covenants, the notices required, the enforcement provisions, are simply not a covenant based on Plaintiff's self-serving and unsupported definition of what it means to be a covenant. They are incorrect.

"It is well-settled that restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent as determined from the entire document. *Taylor v. Lindsey,* 332 S.C. 1, 498 S.E. 2d 862 (1998); *RV Resort and Yacht Club Owners Ass'n v. BillyBob's,* 386 S.C. 313, 688 S.E. 2d 555 (2010). A fair reading the entirety of Exhibit 1 is that Art. 1, Definitions is most certainly a part of "the covenants" between the Association membership.

Plaintiffs site to one case, a 1978 case from Illinois and cherry pick a quote:

> "In the present case, however we are not dealing with a covenant *per se*, but rather, with a reservation of a right to bring additional property within the terms of the covenants contained in the Fairway Declaration."

Fairway of County Lakes Townhomes Ass'n v. Shanandoah Development Corporation, 113 Ill.App. 932,935, 447 N.E. 2d 1367,1369 (Ill. App. 1978).

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The case has nothing to do with amending a definition in an Association's Covenants. It is a dispute between to separate owners' associations. In *Fairway*, the original developer of Fairways of County Lakes Townhomes Association, owned 2 parcels of land. *Fairway*, 113 Ill.App at 933, 447 N.E.2d at 1368. On one he developed Fairways of County Lakes. In the Fairways Declarations the developer retained a right, to exercise in his sole discretion, to add the retained property to the Fairways Declaration. *Id.* 113 Ill. App. at 934, 446 N.E.2d at 1368. However, the original developer, in whom the exclusive right was held, sold the additional property prior to adding it to Fairway. *Id. 113* Ill. App. at 934, 446 N.E.2d at 1368 -1369. Years later the new (third) owner attempted to annex the property into the Fairway Declarations. *Id. 113* Ill. App. at 934-935, 446 N.E.2d at 1368-1369. The court said the right retained by the original developer was a unilateral modification or revocation of a restrictive covenant reserved to the original developer only and that right did not convey when the property was sold. The right was a personal right to be exercised by the original developer only. *Id. 113* Ill. App. at 936-937, 446 N.E.2d at 1368-1371.

Here, the Association has amended a part of the Covenants, i.e. the definition of Common Properties, as it has a right to do. The Modification does not and did not purport to add Braddock Cove as a part of the Association wherein the property would have voting rights and the owner required to pay assessments. The Modification simply adds Braddock Cove within the definition of Common Properties because it touches and concerns and runs adjacent to Association Member properties, therefore its health impacts the values of the Memberships' properties and the very physical health of the Members. Moreover, Art. II §§ 2 and 3 are irrelevant to the Modification.

II. That the Modification references the Quit Claim Deed dated July 15, 1985 does not establish that the 30-day Notice of the Meeting was not satisfied.

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One of the reasons statute of limitations apply to challenges such as launched here by the Plaintiffs is the loss of evidence. The date of the Quit Claim Deed does not prove that the Association failed to give appropriate notice per the Covenants. The vote was to broaden the definition of Common Properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove. The date of the Quit Claim Deed does not preclude the fact that 30 days prior to the vote the Association mailed to every owner written notice of the proposal that the Covenants be modified to broaden the definition of Common Properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove. The actual notice, more likely than not, would be available if the Plaintiffs had not delayed 36 years to challenge whether the notice was sufficient.

Also, Plaintiff asserts the Modification falsely states that it passed by a unanimous vote because Trager says he did not vote for it. (See Plaintiffs' Trial Brief vote note 53). Trager is trying to hide the ball and the statement is disingenuous. The Modification does not indicate every member voted for the Modification. It says the Association, voted at its annual meeting on August 3, 1985, by unanimous vote. (Ex. 3). It does not assert that every member at the time voted in its favor. The only members who voted would necessarily be those that attended the meeting in person or by proxy representing a quorum. Many members, such as Trager, may not have voted in its favor as they did not attend the meeting. Mr. Trager does not recall going to the meeting. (Ex. 41 Deposition of Peter Trager, February 1, 2024, 22:22-23:9).

III. Plaintiff's assertion that the Modification is unreasonable, indefinite and contravenes public policy is incorrect.

1. <u>The Modification is not Unreasonable</u>

Plaintiffs cite to a North Carolina case to argue the Modification is unreasonable because it enlarges substantially the list of activities the homeowners could be assessed to support.

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*Armstrong v. Ledges Homeowners Ass'n, Inc.,*633 S.E.2d 78, 87, 360 N.C. 547(N.C. 2006).[2] *Armstrong* in facts (see footnote 2) and law is not similar to this case at all. The Association in this case per the Covenants is charged with preserving the values in the community. (Ex. 1, p.1). The Ledge's Covenants did not provide that authority. Further, North Carolina's nonprofit corporation statute in 2006 apparently allowed a limited interpretation of the powers of a non-profit corporation. *Id.,*633 S.E.2d at 81, 360 N.C. at 547. That is not the case in South Carolina under the new Non-Profit Corporations Act. The Official Comment 1 to the Act provides "A major problem with the prior nonprofit statute (former Chapter 31, Title 33) was that it did not grant nonprofit entities the necessary powers to operate efficiently. (emphasis added). The South Carolina Reporters' Comments go on to state, in response to the holding in *Lovering* v. *Seabrook Island Property Owners Assoc.*, 289 S.C. 77, 344 S.E. 2d 862 (Ct. Apps. 1986), aff'd. & mod. 291 S.C. 201, 352 S.E.2d 707 (1987) (cited by Plaintiffs),

> "[I]t is also troubling that the Court of Appeals states that the corporate "powers" should be narrowly construed. This certainly is not the thrust of the Model Business Corporation or Nonprofit Corporation Act, and hopefully will not be the way the new statutory powers are construed in the future. In fact, in adopting paragraph (18), it is the intent that the grant of powers is to be very broadly interpreted. It is the intent of this new statute, as specifically required in Section 33-31-302(18), that every nonprofit corporation has the unbridled power to "do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation." Section 33-31-302 of this Act is not to be narrowly construed.
>
> See 33-31-302 South Carolina Reporters' Comments, Comment 1.

[2] The facts of the *Armstong* case could not be more different than South Beach. In *Armstrong* the original affirmative covenants contained in their deeds authorized for nominal assessments for the maintenance of a lighted sign at the subdivision entrance. There was no intent in their Declarations to preserve and protect the values in the community. Therefore, the Association's subsequent amendment of the Declaration to authorize broad general assessments to "promot[e] the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The Ledges as may be more specifically authorized from time to time by the Board" was deemed invalid and unenforceable by the court.

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Further, in discussing *Lovering* the South Carolina Reporters' Comments state "the court states that in determining the corporation's powers its charter is to be strictly construed. This is confusing. First of all, the corporation's powers are set forth in the statute and not in the charter. Second whether the "use" or "exercise" of a power to accomplish a particular objective should be "narrowly construed" is a different question. The court does not seem to make the distinction between whether a corporation has the "power" to do something generally, as contrasted with whether it has the right to exercise that power for a specific objective--whether the use of the power has been properly authorized. A simple example may help. No one would dispute the fact that a nonprofit corporation has the power to borrow money. However, if no one in the corporation properly approves of a particular loan, the corporation simply cannot borrow the money (even though the corporation has the "power" to borrow money)." The same is true here where if the members of the Association vote against the dredge of Braddock Cove, they will not pay to dredge the Cove. In South Carolina Reporters' Official Comment 4a. to the Act, the Legislature tells us that:

> "Broad interpretation. It is important to note that the final power, section 33-31-302(18), gives the corporation the power to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation. The purpose of item (18) is to ensure that all of the powers granted in this section are broadly interpreted and that there be no limitation imposed on the powers of any nonprofit corporation. As noted above, this specifically modifies the holdings of *Lovering v. Seabrook Island Property Owners Assoc.*, 289 S.C. 77, 344 S.E. 2d 862 (Ct. Apps. 1986), aff'd. & mod. 291 S.C. 201, 352 S.E.2d 707 (1987)."

Plaintiffs argue that because the definition of "Common Properties" is extended to include unowned property, Braddock Cove, it "drastically changes the original deal". They are wrong. First, Braddock Cove is not added property to the development under Art II because it is not property being added to the community subject to assessments and endowed with voting rights.

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The "deal" under the Covenants is that the Association was created for the "efficient preservation of the values" in the community. (Ex. 1, and Ex. 27). Dredging of Braddock Cove is imperative to South Beach Community, the shore along which it runs, in terms of community values and health. Therefore, the Modification is not inconsistent with the "Plan of this Declaration". It would and does preserve the values in the community. (See Ex. 8, p. 3; Ex. 9, p. 8; Ex. 21; Ex. 32, item 8). Although Plaintiffs conflate issues by referring to Art. II, §§ 2(a)-(b), it is frivolous to argue the maintenance of Braddock Cove is inconsistent with the "Plan of this Declaration", when in the very first paragraph the Covenants state that the Company desires to provide for the preservation of the values in the community and for the maintenance of boat channels. (Ex. 1, p. 1). There are no other boat channels other than Braddock Cove. (See Ex. 20).

2. <u>The Modification is not Indefinite</u>

Again, Plaintiff cites to a North Carolina case, *Beech Mountain Prop. Owners Ass'n v. Seifert,* 269 S.E.2d 178, 48 N.C. App 286 (1980) that is not binding on this court and concerns facts that bear absolutely no resemblance to those in this case. Further, the case is 44 years old and there is no indication that North Carolina has a statute that requires broad interpretation of the powers of the non-profit corporation. Further, despite Plaintiffs' assertions, the Modification does not authorize the Association to bind the Members to pay future assessments in "whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable". In *Beech Mountain*, the covenants as amended did not identify with particularity the property to be maintained. *Id.* 269 S.E.2d at 183, 48 N.C. App at 295. The Court noted in *Beech Mountain "*nothing in the record reflects that any of the defendants could have known at the time they accepted their deeds what roads or trails would be required to be maintained with revenues from assessments. Even more important is that there is nothing in the covenant which can guide the

court should it be called upon to review the determination by the Property Owners' Association as to what particular roads and trails it elects to maintain," or "recreational areas" it refers to. *Id.* 269 S.E.2d at 183, 48 N.C. App at 296. In fact, the members were not even allowed a vote on the changes to the covenants.

When these Plaintiffs accepted their deed, they knew exactly what would be required to be maintained. The Modification in this case adds to the definition of common properties Braddock Cove. In doing so the definition of Common Properties is amended to read:

> "those areas of land with any improvements thereon which ae deeded to the Association and designated in said deed as "Common Properties". All "Common Properties" shall include any personal property acquired by the Association if said property is designated as "Common Property". All Common Properties are to be devoted to and intended for common use and enjoyment of the owners of the Properties, subject to the fee schedules and operating rules adopted by the association. **Further, Common Properties includes all boat channels, waterways, channel markers and sale marsh open space areas of Braddock Cove**." (Emphasis added).

Further, the Quit Claim Deed that Plaintiffs insist on referencing describes exactly where and what Braddock Cove is (Ex. 2). There is nothing indefinite about the Modification. Further, by allowing the Association to maintain Braddock Cove through assessments it did not make the covenants indefinite. Art. V controls the purposes for which the assessments may be used. Art. V, § 2 still allows the assessments levied on itself by the Association to be used for maintenance of the common properties, which since 1985 included Braddock Cove. Further, under Art. V, § 4, the covenants dictate how special assessments can be levied and used. The Modification made the Cove a common property which in turn based on the covenants allows the Association to use assessments to maintain it, as well as vote on special assessments for its maintenance. This court can absolutely determine what the special assessments are being used for and where.

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Further, even though the holding in *Lovering* was modified by statute, the elements outlined in the case cited by Plaintiffs are satisfied. Dredging of Braddock Cove is only required periodically. The standard for determining the liability for the assessment is based on the Association's share of the cost of the dredge split among its members. The property to be maintained is the creek. It could not be clearer that the purpose the dredge is to maintain Braddock Cove. The Covenants provide at Art. V, § 3 that "Board of Directors of the Association may, after consideration of current maintenance costs and future needs of the Association, fix the assessments for any year". Further, Art. V, § 4, dictates the special assessment is the cost of the maintenance. It's not difficult to determine the exact cost of the dredge and per member assessment.

That the Association can decide whether or not to participate in a dredge in a given year does not give rise to a subjective standard. Like with any common property, the Association gets to decide if maintenance is needed. The same applies to maintaining Braddock Cove.

The Modification does not "bind the Association to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable" as Plaintiffs pretend. (See Plaintiffs' Trial Brief p. 32). That is absurd.

IV. The Modification does not violate public policy, touches and concerns the land, is a real covenant BECAUSE the condition of Braddock Cove undoubtedly impacts the value of the properties in the community.

Every case cited by plaintiff in support of their position, though not binding on this Court,[3] holds that a covenant touches and concerns the land if it substantially affects the rights of the parties as landowners. *See Neponsit Property Owners' Assoc. v. Emigrant Industrial Saving Bank,* 15 N.E. 2d 793 (NY 1938); *Epting v. Lexington Water Power Co.*, 177 S.C. 308(1935) (To run

[3] *Neponsit* is an almost 86-year-old case from NY; *Epting* is an 89-year-old case from South Carolina under the old non-profit corporation statute; and *MidSouth* is a 17-year-old case from North Carolina.

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with the land, covenants must relate to the realty demised, having for its object something annexed to it, or inherent in or connected with the land; that its performance or nonperformance must affect the nature, quality, value mode of enjoyment of the demised premises) emphasis added; *Midsouth Golf LLC v. Fairfield Harbourside Condominium Assoc., Inc.,* 187 N.C. App. 22 (2007) (the covenant must be so closely connected with the real property that it touches and concerns the land)[4]. Judge Dukes has rules that the covenant touches and concerns the land. (Ex. 27). Further, Braddock Cove runs along and borders properties within the Association. The community is a waterfront community because it is on Braddock Cove. We refer to Defendant's Pretrial Brief where we explain in detail why the maintenance of Braddock Cove is imperative to the values and health of the properties owned by the Association members, as well as the exhibits noted above. Indeed, after an exhaustive study of the need and propriety of dredging the south Sea Pines waterways (Harbortown Yacht Basin, Braddock Cove Creek and Baynard Creek) in 2011, the governing bodies of Sea Pines passed a joint resolution adopting the report of a specially empaneled waterways task force: par. 8. The Task Force considered the adverse effects of not dredging the Sea Pines Waterways, including the effects the Heritage Golf Tournament, tourism in general and more specifically … the South Beach Village... and the values of our homes…The Taks Force concluded that there would be significant adverse effects if dredging were not conducted as soon as possible. (Ex. 32) (See Defendant's Amended Pretrial Brief, fn 5, p. 15).

On page 33 of their brief, Plaintiffs continuously argue that dredging Braddock Cove, which the Association does not own, merely provides a benefit to the Cove and is a gratuitous act

[4] Note that in *Midsouth* the recreational amenities were not in, on or near the Fairfield Harborside community, they were across the road.

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only for the benefit of the State. It simply is not true. The dredge unquestionably benefits the values of the home in South Beach. As outlined in the Defendant's Trial Briefs permits must be gained from the State to allow the dredging, which has always been accomplished. The power to dredge is found in the S.C. Code Ann. § 33-31-302, the Covenants (Ex. 1), and the Articles of Incorporation, wherein the Association is mandated to preserve property values.

V. Plaintiff is incorrect that the Modification and special assessment to dredge of Braddock Cove is personal and does not touch and concern the land.

According to the cases cited by Plaintiffs a covenant touches and concerns the land when it impacts the "value and mode of enjoyment" of the thing demised. *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 181 S.E. 66, 70 (1935). The *Epting* court provided an example of a covenant that runs with the land: If A owns a tract of 100 acres served throughout by a ditch, and sells the one-half to B with covenants to keep the ditch open and clean throughout for the benefit of the entire tract, the execution and delivery would bind A; the acceptance, B and his assigns, and a covenant is created that is at once a benefit to one and a burden to the other; but it concerns the land, respects the thing demised, <u>its value and mode of enjoyment</u>. (emphasis added). *Id.* "Many cases hold that the question whether a covenant will or will not run with the land does not depend so much on whether it is to be performed on the land itself as on whether it tends to directly or necessarily to enhance the value or render the use more beneficial and convenient to those by whom it is owned or occupied." *Id.* Even though a covenant relates to the adjoining land, it was for the benefit of, and so ran with, the land demised. *Id.* citing *Ricketts v. Enfield Church Wardens,* 1 Ch. 544 (1909). There is no evidence contrary to the position that a healthy and dredged Braddock Cove adds value to the South Beach Community. Moreover, the new Non-profit Act is to be broadly interpreted to allow the Association to do what is necessary to protect the values of

the community. Also, the Covenants at issue here are between the Members not some third party, which most of the cases cited by Plaintiffs concern.

The Plaintiff are of the mistaken belief that the benefit provided by the burden of an assessment requires some interest in or access to the other property. That is not correct. If the burden provides value in terms of maintaining property values of those assessed, the benefit is received.

CONCLUSION

The Plaintiffs are incorrect in their positions, arguments and conclusions. The Association has the right to pay special assessments to dredge Braddock Cove; the 1985 Modification is valid and enforceable, and it is not unreasonable, indefinite and nor does it violate public policy. Further, the owners of properties in the Association have a property interest in maintaining the health of Braddock Cove. Finally, the rights of the Association to amend the definition of Common Property and pay assessments to dredge Braddock Cove is support by S.C. Code Ann §33-31-302 and the law of South Carolina.

The Court should declare that the Covenants, as amended by the Modification, create the right for Association Members to self-impose, upon 75% voter approval at duly held meetings, assessments for funding the Association's share of maintenance dredging of Braddock Cove. Accordingly, the Court should deny Plaintiffs' claim in this regard and grant the Association's requested counterclaim.

In addition, the Court should conclude that Plaintiffs' claims are barred by preclusion and the statute of limitations. Also, the Court should conclude that Plaintiffs have not demonstrated

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entitlement to derivative status and that there is no basis for Plaintiffs' claims that the Association's actions as contested are ultra vires.

Finally, the Court should dismiss with prejudice all Plaintiffs' claims and enter judgment with costs in favor of the Association

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April 29, 2023
Mount Pleasant, South Carolina

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STANLEY S. STROUP, AS TRUSTEE OF THE STANLEY S. STROUP REVOCABLE TRUST DATED NOVEMBER 10, 2023, ET AL. V. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION
CASE NO. 21021-CP-07-01655

DEFENDANT'S RULE 12(B)(1) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICATION

EXHIBIT 6
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
CASE NO. 2014-CP-07-1435
CATWALK, LLC, ET AL. V. SEA PINES SOUTH BEACH PROPERTY OWNERS ASSOCIATION, INC.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NUMBER 2014-CP-07-1435

CATWALK, LLC; MOONDOG, LLC; LET, LLC: LOST PARROT LLC; VACATION INN, LLC; SBM, LLC; SOUTH BEACH SWIMMING POOL, INC.,

Plaintiffs,

vs.

SEA PINES SOUTH BEACH PROPERTY OWNERS' ASSOCIATION, INC.,

Defendant.

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

2014 JUL 15 PM 2:08
BEAUFORT COUNTY, S.C.

Please take notice that Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot, LLC; Vacation Inn, LLC; SBM, LLC; and, South Beach Swimming Pool, Inc. (hereinafter, the "Plaintiffs"), by and through its undersigned counsel, shall move before the Hon. Marvin H. Dukes, III, Master In Equity and Special Circuit Judge for Beaufort County, South Carolina, at the Beaufort County Court House, 102 Ribaut Road, Beaufort, South Carolina, on the 10th day following the service hereof, at 10:00 o'clock, A. M., or at such other time and place as set by the Court, for summary judgment in their favor and against the Sea Pines South Beach Owners' Association, Inc. (hereinafter, the "Association"), pursuant to Rule 56, South Carolina Rules of Civil Procedure ("SCRCP"), on the grounds that there is no genuine issues as to any material fact and the Plaintiffs are entitled to judgment as a matter of law.

The Plaintiffs' motion is based upon the pleadings, the record on file with the Court, this notice, the Affidavits of Robert A. Gossett, Jr., Ned E. Gilleland, Sr., Richard T. Sonberg and Charles A. Scarminach, Esq., served herewith, Rule 56, SCRCP, and all other law as is

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then and there applicable.

SUMMARY JUDGMENT STANDARD

Under Rule 56, SCRCP, Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Café Associates Limited v. Gengross*, 305 S.C. 6, 406 S.E.2d 162 (S.C. 1991). Under Rule 56, SCRCP, Summary Judgment is appropriate:

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In determining whether any material issue of fact exists, the evidence and all inferences that can be drawn from the evidence must be viewed in the light most favorable to the non-moving party, or the party resisting the motion. *Redwend Limited Partnership v. Edwards*, 354 S.C. 58, 581 S.E.2d 496 (S.C. App 2003). The purpose of Summary Judgment is to expedite the disposition of cases that do not require the services of a fact-finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003). "For purposes of Summary Judgment, and issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action." *P.P.G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (S.C. App. 1988). Once the moving party has met its burden of demonstrating that no genuine issue of material fact exists, a party defeats summary judgment by affirmatively demonstrating the presence of a genuine issue of material fact. Rule 56(e) SCRCP states a party may not rest upon the mere allegations or denials of his pleadings. *Hoard ex rel. Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (S.C. 2010).

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FACTS

The following facts are undisputed, or cannot be disputed by the Association:

1. The Plaintiffs are the owners of multiple parcels of real property situate in a commercial tract within Sea Pines on Hilton Head Island.[1]

2. The Sea Pines South Beach Property Owners' Association, Inc., is a residential homeowners association that was established by the Lighthouse Beach Company, A South Carolina Limited Partnership, in a recorded "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina" (hereinafter, the "Sea Pines South Beach Covenants").[2]

3. The Sea Pines South Beach Covenants were recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, on August 18, 1970, in Official Record Book 176 at Page 203.[3]

4. On February 15, 1973, the Lighthouse Beach Company, A South Carolina Limited Partnership, recorded a "Declaration of Rights, Restrictions, Affirmative Obligations, Conditions, Etc., which Constitute Covenants Running with certain Commercial Lands of Lighthouse Beach Company (hereinafter, the "Commercial Covenants").[4]

5. The Commercial Covenants were recorded in the Office of The Register of Deeds for

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[1] *See:* Complaint, Paragraphs 10 through 16; Affidavit of Robert A. Gossett, paragraphs 3 through 9; Affidavit of Charles A. Scarminach, Page 10.

[2] *See:* Complaint, Paragraph 17; Answer and Counterclaim, Paragraph 5.

[3] *See:* Complaint, Paragraph 18; Answer and Counterclaim, Paragraph 5; Affidavit of Charles A. Scarminach, Paragraph 5.

[4] *See* Complaint, Paragraph 19; Answer and Counterclaim, Paragraph 5; Affidavit of Charles A. Scarminach, Paragraph 6.

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Beaufort County, South Carolina, in Official Record Book 206 at Page 1143.[5]

6. The Commercial Covenants apply to Commercial Property, which is described as follows in Article 2 of the Commercial Covenants:

> Whenever used herein, the term "Commercial Property" shall apply to property used or to be used for all retail commercial uses except "package stores" for the sale and take-out of alcoholic beverages and real estate sales offices which accept listings, and offer for sale, real property outside the Forest Beach area. Permissible retail commercial uses shall include, but not be limited to, retail shops, hotel, motel, motor hotel, or motor lodge sites or operation, and all other Class "B" multi-family residence areas such as condominiums or apartments.[6]

7. The Commercial Covenants read as follows, in relevant part:

> It is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that the covenants and restrictions contained herein shall be the sole applicable covenants restricting Commercial Property conveyed by LIGHTHOUSE BEACH COMPANY to grantees of the Company subsequent to the date of the Declaration adopting these covenants and restrictions being made applicable to such conveyances by specific references in individual deeds, or by subsequent declaration to the extent that there is variation from and addition to covenants herein recorded; however, those properties conveyed by LIGHTHOUSE BEACH COMPANY prior to the effective date of this instrument are not governed by or otherwise restricted by the consolidated uniform provisions of this Declaration, but are so governed and restricted by any covenants and restrictions previously recorded as set forth above and to which specific reference was made in the particular and appropriate deed of conveyance.[7]

8. The real property owned by the Plaintiffs that lie within South Beach Marina Village

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[5] *See*: Complaint, Paragraph 21; Answer and Counterclaim, Paragraph 5; Affidavit of Charles A. Scarminach, Paragraph 6.

[6] *See*: Complaint, Paragraph 22; Answer and Counterclaim, Paragraph 7; Affidavit of Charles A. Scarminach, Paragraph 7. There is a subsequent "Declaration of Covenants and Restrictions by Sea Pines Plantation Company, Inc.", recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Official Record Book 224 at Page 1036, that includes terms related to Commercial properties in Sea Pines. The subsequent declaration does not affect the issues present in this case.

[7] *See*: Complaint, Paragraph 23; Answer and Counterclaim, Paragraph 5; Affidavit of Charles A. Scarminach, Paragraph 8. There is a subsequent

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are "Commercial Properties" as the same are described in the Commercial Covenants.[8]

9. At various times prior to January 3, 1984, the Sea Pines Plantation Company owned all or substantially all of the real property lying within the confines of the South Beach Marina Village.[9]

10. On or about January 3, 1984, the Sea Pines Plantation Company conveyed all of the real property that it owned within the confines of South Beach Marina Village to South Beach Marina Village, A Partnership.[10]

11. Between 1988 and 1998, South Beach Marina Village, A Partnership, subsequently conveyed all of the property it owned within the confines of South Beach Marina Village to various entities and individuals, including Ned E. Gilleland, Sr.; the Gilleland Family Partnership; South Beach Marina Limited Partnership; and Robert A. Gossett, Jr.[11]

12. Between 1984 and 2008, Robert A. Gossett, Jr., and the Plaintiffs herein acquired all of the real property lying within the confines of the South Beach Marina Village with the exception of a single quarter share of one unit in the "South Beach Inn" which is known as R550-017-000-1212-0217(D).[12]

13. All of the properties lying within the confines of South Beach Marina Village, with

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[8] *See:* Complaint, Paragraph 24; Answer and Counterclaim Paragraph 8. The Association asserts a lack of information to admit or deny the allegation, but does not allege any fact to controvert the allegation in the Complaint; Affidavit of Charles A. Scarminach, Paragraph 10; Affidavit of Robert A. Gossett, Jr., Paragraph 2.

[9] *See:* Affidavit of Charles A. Scarminach, Paragraph 9.

[10] *See:* Affidavit of Charles A. Scarminach, Paragraph 9; Affidavit of Ned E. Gilleland, Sr., Paragraph 3.

[11] *See:* Affidavit of Ned E. Gilleland, Jr., Paragraphs 3, 4 and 5; Affidavit of Richard T. Sonberg, Paragraph 3; Affidavit of Robert A. Gossett, Jr., Paragraphs 6, 9,

[12] *See:* Affidavit of Robert A. Gossett, Jr., Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9.

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the exception of a single quarter share of one unit in the "South Beach Inn" which is known as R550-017-000-1212-0217(D), are currently owed by the Plaintiffs.[13]

14. In July of 2013, the Association asserted that the real property owned by the Plaintiffs was subject to the Sea Pines South Beach Covenants.[14]

15. Between August 18, 1970, and July of 2013, the Association never:

(a) Asserted never that any of the properties owned by the Sea Pines Company in the South Beach Marina Village were encumbered or otherwise affected by the Sea Pines South Beach Covenants, that the Sea Pines Company was obligated to pay assessments to the Association arising under the South Beach Covenants, that the Sea Pines Company was a member of the Association, or that the Sea Pines Company had any rights or obligations arising from the Sea Pines South Beach Covenants.[15]

(b) Asserted that any of the properties owned by Ned E. Gilleland, Sr., or South Beach Marina Village, a Partnership, or Gilleland Family Partnership, in the South Beach Marina Village were encumbered or otherwise affected by the Sea Pines South Beach Covenants, that Ned E. Gilleland, Sr., or South Beach Marina Village, a Partnership, or Gilleland Family Partnership were obligated to pay assessments to the Association arising under the South Beach Covenants, that Ned E. Gilleland, Sr., or South Beach Marina Village, a Partnership, or Gilleland Family Partnership were members of the Association, or that Ned E. Gilleland, Sr., or South Beach Marina Village, a Partnership, or Gilleland Family Partnership had any rights or obligations arising from the Sea Pines South Beach Covenants.[16]

(c) Asserted that any of the properties owned by South Beach Marina Limited Partnership, in the South Beach Marina Village were encumbered or otherwise affected by the Sea Pines South Beach Covenants, that South Beach Marina Limited Partnership was obligated to pay assessments to the Association arising under the South Beach Covenants, that South Beach Marina Limited Partnership, was a member of the Association, or that South

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[13] *See:* Affidavit of Robert A. Gossett, Jr., Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9.

[14] *See:* Complaint, Paragraph 33; Answer and Counterclaim, Paragraph 12. The Association does not allege that it asserted that the Sea Pines South Beach Covenants encumbered the Plaintiffs' property prior to July of 2013.

[15] *See:* Affidavit of Charles A. Scarminach, Paragraph 11.

[16] *See:* Affidavit of Ned E. Gilleland, Sr., Paragraph, 6, 7 and 8.

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Beach Marina Limited Partnership, had any rights or obligations arising from the Sea Pines South Beach Covenants.[17]

(d) Asserted that any of the properties owned by Robert A. Gossett, Jr., or the Plaintiffs, in the South Beach Marina Village were encumbered or otherwise affected by the Sea Pines South Beach Covenants, that Robert A. Gossett, Jr., or any of the Plaintiffs were obligated to pay assessments to the Association arising under the South Beach Covenants, that Robert A. Gossett, Jr., or any of the Plaintiffs were members of the Association, or that Robert A. Gossett, Jr., or any of the Plaintiffs had any rights or obligations arising from the Sea Pines South Beach Covenants.[18]

16. Neither the Sea Pines Company, South Beach Marina Village, A Partnership, Ned E. Gilleland, Sr., the Gilleland Family Partnership, South Beach Marina Limited Partnership, Robert A. Gossett, Jr., or any of the Plaintiffs have ever paid a regular or special assessment to the Association related to any of the properties owned by them within the confines of South Beach Marina Village.[19]

17. Neither South Beach Marina Village, A Partnership, Ned E. Gilleland, Sr., the Gilleland Family Partnership, South Beach Marina Limited Partnership, Robert A. Gossett, Jr., or any of the Plaintiffs have ever attended any regular or special meeting of the Association in their capacity as an owner of any of the properties owned by them within the confines of South Beach Marina Village.[20]

18. Neither the Sea Pines Company, South Beach Marina Village, A Partnership, Ned E. Gilleland, Sr., the Gilleland Family Partnership, South Beach Marina Limited Partnership,

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[17] *See:* Affidavit of Richard T. Sonberg, Paragraphs 4, 8 and 9.

[18] *See:* Affidavit of Robert A. Gossett, Jr., Paragraphs 10, 11 and 12.

[19] *See:* Affidavit of Charles A. Scarminach, Paragraph 12; Affidavit of Ned E. Gilleland, Sr., Paragraph 9; Affidavit of Richard T. Sonberg, Paragraph 9; Affidavit of Robert A. Gossett, Jr., Paragraph 13.

[20] *See:* Affidavit of Ned E. Gilleland, Sr., Paragraph 10; Affidavit of Richard T. Sonberg, Paragraph 10; Affidavit of Robert A. Gossett, Jr., Paragraph 14.

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Robert A. Gossett, Jr., or any of the Plaintiffs, have ever asserted that they had any rights of any nature arising under the Sea Pines South Beach Covenants, related to any of the properties owned by them lying within the confines of South Beach Marina Village.[21]

19. Neither South Beach Marina Village, A Partnership, Ned E. Gilleland, Sr., the Gilleland Family Partnership, South Beach Marina Limited Partnership, Robert A. Gossett, Jr., or any of the Plaintiffs have ever made any use of Common Property owned by the Association, in any way that is related to their ownership of real property within the confines of South Beach Marina Village.[22]

20. On or about October 22, 2013, the South Island Dredging Association, Inc., The Harbour Town Yacht Club Boat Slip Owners Association, Inc., the Gull Point Property Owners Association, Inc., South Beach Marina, Inc., and the Sea Pines South Beach Property Owners Association, Inc., entered into an Agreement for the purpose, among other things, of providing funding to pay for the dredging of waterways described as the Harbour Town Marina and Braddock Cove Creek.[23]

21. South Beach Marina, Inc., is a corporation organized and existing under the laws fo the State of South Carolina, with its principal place of business in Beaufort County, South Carolina. Robert A. Gossett, Jr., is a principal in South Beach Marina, Inc. South Beach Marina, Inc., is the corporate entity through which Robert A. Gossett, Jr., as principal of

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[21] *See:* Affidavit of Charles A. Scarminach, Paragraph 13; Affidavit of Ned E. Gilleland, Sr., Paragraph 11; Affidavit of Richard T. Sonberg, Paragraph 11; Affidavit of Robert A. Gossett, Jr., Paragraph 15.

[22] *See:* Affidavit of Ned E. Gilleland, Sr., Paragraph 12; Affidavit of Richard T. Sonberg, Paragraph 12; Affidavit of Robert A. Gossett, Jr., Paragraph 16.

[23] Braddock Cove Creek is the same body of water described in the Answer and Counterclaim of the Association and herein as Braddock Cove.

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Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC; SBM, LLC; and South Beach Swimming Pool, Inc., contributed to the funding of the dredging of Braddock Cove Creek.

22. The terms and conditions of the October 22, 2013, Agreement, include the following:

> 3. **Liability for Allocated Costs.** Each Participating Party is solely and only responsible for payment of the Project allocated to each under the Agreement. Each Participating Party will promptly pay to Project Administrator its required contributions to pay any allocation to its account, and as necessary thereafter to balance the accounts of the parties following completion of the Project with the Agreement.

23. South Beach Marina, Inc., contributed the sum of Seven Hundred Eighty Seven Thousand and no/100 ($787,000.00) Dollars, or approximately 40% of the total cost of the dredging of Braddock Cove Creek.

ARGUMENT

The properties lying within South Beach Marina Village are all commercial properties. By the express language of the Commercial Covenants, the Commercial Covenants are: ". . . the sole applicable covenants restricting Commercial Property. . . ."[24]

The rules applicable to the construction of contracts are applicable to the construction of covenants in deeds. 17 S.C. Juris. *Covenants* § 69 (1993). However, covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. *Hyer v. McRee*, 306 S.C. 210, 410 S.E.2d 604 (SCApp.1991).[25] Where there is doubt, the doubt must be resolved in favor of the property's free use. *Id.* As

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[24] *See:* Affidavit of Charles A. Scarminach, Paragraph 8.

[25] Thus, to the extent the Association argues that the existence of the Sea Pines South Beach Covenants in the chain of title to any of the Plaintiffs' properties creates an ambiguity as to their applicability, as a matter of law, the ambiguity is resolved against the Association.

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voluntary contracts, restrictive covenants will be enforced unless they are indefinite or contravene public policy. 17 S.C. Juris. *Covenants* § 100 (1993) (citing *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987)). *See also: Houck v. Rivers*, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct. App. 1994) overruled on other grounds by *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 680 S.E.2d 289 (2009).

In this case, the plain language of the Commercial Covenants is that the Commercial Covenants are the only covenants that govern commercial property. The only evidence in this case is that the Plaintiffs' real property within South Beach Marina Village is commercial property. If the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *Lee v. Univ. of S. Carolina*, 407 S.C. 512, 757 S.E.2d 394 (SC 2014).

In addition to the above, to the extent that the Association claims an interest in the Plaintiffs' real property arising from the Sea Pines South Beach Covenants, the Association is barred from asserting such a claim as a result of its inaction for a period of more than 40 years.[26] S. C. Code Ann. § 15-3-380 (Supp. 2014), reads:

> No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall

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[26] The Sea Pines South Beach Covenants were recorded in August 18, 1970. *See:* Complaint, Paragraph 18; Answer and Counterclaim, Paragraph 5. The first time that the Association made any claim that the Sea Pines South Beach Covenants encumbered any of the Plaintiffs' real property was July o f 2013. *See:* Affidavit of Robert A. Gossett, Jr., Paragraphs 10, 11 and 12. *See also:* Affidavit of Charles A. Scarminach, Paragraphs 11 and 12; Affidavit of Ned E. Gilleland, Sr., Paragraphs 6, 7 and 8; Affidavit of Richard T. Sonberg, Paragraphs 6, 7 and 8.

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be deemed valid against the world after the lapse of such a period.

Under the express language of S. C. Code Ann. § 15-3-380 (Supp. 2014), the Association's inaction for a period of more than 40 years operates as a complete bar to the Association's claim "for any interest" in the Plaintiffs' real property.

In its Answer and Counterclaim, the Association asserts that the Plaintiffs are estopped to claim that the Sea Pines South Beach Covenants do not apply to their property, or that the Plaintiffs have waived any right they had to assert that the Sea Pines South Beach Covenants do not apply to their property. The basis of both the estoppel and waiver claims is: "...the participation in and accrual of benefits to them through the efforts of the [Association], specifically the dredging of Braddock Cove."[27] The allegation appears to be that the Association undertook to dredge Braddock Cove, that the Plaintiffs received a benefit from the Association's work. Based on the receipt of the benefit by the Plaintiffs, the Association claims that the Plaintiffs have waived their right to, or are estopped to, argue that their real properties are not encumbered by the Sea Pines South Beach Covenants.

First, the factual basis of the Association's argument is wrong. The Plaintiffs did not receive any benefit from the dredging of Braddock Cove that they did not pay for pro-rata, through South Beach Marina, Inc.[28] The Plaintiffs' contribution through South Beach Marina, Inc., was nearly 40% of the total cost of the dredging of Braddock Cove, which

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[27] *See:* Answer and Counterclaim, Paragraphs 31, 32, 46 and 47. Braddock Cove is a tidal waterway that fronts property owned by the Association and its members, and the South Beach Marina Village and all of the properties in it. Braddock Cove also fronts the Gull Point Marina, but the interests of the Gull Point Marina are not at issue in this action.

[28] *See:* Affidavit of Robert A. Gossett, Jr., Paragraphs 18, 19 and 20; Exhibit "A" to Affidavit of Robert A. Gossett, Jr.

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exceeds the contribution of the Association.[29] The contract for the dredging of Braddock Cove, to which the Association is a party, sets out the express terms of the agreement by the parties to it, and the contract neither mentions nor makes any reference to the Sea Pines South Beach Covenants.[30]

A party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.[31] There is no evidence to suggest that any of the Plaintiffs knew or could have known that by contributing to the dredging of Braddock Cove through South Beach Marina, Inc., they would waive their right to contest the Association's claim that Sea Pines South Beach Covenants encumbered their property.

The essential elements that must be shown by a party claiming an estoppel are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.[32] There is no evidence that the Plaintiffs did anything that the Association relied on in connection with the dredging of Braddock Cove, and there is no evidence that the Association changed its position to its detriment based on anything the Plaintiffs did or are claimed to have done The contract for the dredging of Braddock Cove sets out the complete agreement of the parties to it in connection with the dredging project.

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29 *See:* Exhibit "A" to Affidavit of Robert A. Gossett, Jr. The contribution of the Association to the dredging of Braddock Cove was around 31% of the total cost.

30 *See:* Exhibit "A" to Affidavit of Robert A. Gossett, Jr.

31 *See: Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (S.C. 1992).

32 *See: Janasik v. Fairway Oaks Villas Horizontal Property Regime, supra.*

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CONCLUSION

The Plaintiffs are entitled to Summary Judgment in this case, because there is no evidence showing the existence of a genuine issue of material fact related to the following:

1. The Sea Pines South Beach Covenants do not encumber the Plaintiffs' real property within the confines of South Beach Marina Village. The covenants applicable to the Plaintiffs' real property are the Commercial Covenants.

2. Even if the Sea Pines South Beach Covenants could be construed to be applicable to the Plaintiffs' real property within the confines of South Beach Marina Village, the Association is barred from enforcing them by S. C. Code Ann. § 15-3-380 (Supp. 2014), and its own inaction and failure to enforce them for a period of more than 40 years.

Further, there is no evidence that the Plaintiffs either waived their right to contest the applicability of the Sea Pines South Beach Covenants to their real property within the confines of South Beach Marina Village, or that the Plaintiffs are estopped to contest the applicability of the Sea Pines South Beach Covenants to their real property within the confines of South Beach Marina Village, that arises from the dredging of Braddock Cove.

Because not genuine issue of material fact exists with respect to any of the claims asserted in this action, as described above, the Plaintiffs are entitled to and move this Court for a grant of Summary Judgment in its favor. Rule 56, SCRCP; *Redwend Limited Partnership v. Edwards, supra.*; *Dawkins v. Fields, supra.*; *P.P.G. Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc., supra.*; *Hoard ex rel. Hoard v. Roper Hospital, Inc., supra.*

Respectfully Submitted:

COLTRANE & WILKINS, LLC

By: _____

Curtis L. Coltrane
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Hilton Head Island, South Carolina

This 10th day of June, 2015.

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EXHIBIT 41

Deposition Transcript of
Peter Saul Trager
February 1, 2024

Pgs. 22: 22 – Pg. 23: 9

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF BEAUFORT
STANLEY S. STROUP, AS TRUSTEE OF THE STANLEY S. STROUP REVOCABLE TRUST DATED NOVEMBER 10, 2003, PETER TRAGER, AND VACATION INN, LLC, EACH BOTH INDIVIDUALLY AND DERIVATIVELY,

Plaintiff,

vs. CASE NO. 2021-CP-07-01655

SEA PINES SOUTH BEACH OWNERS' ASSOCIATIONS, INC.,
Defendant.

VIDEOCONFERENCE
DEPOSITION OF: PETER SAUL TRAGER

DATE: February 1, 2024

TIME: 2:33 PM

LOCATION: 247 South Sea Pines Drive
Apt. 1853
Hilton Head Island, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: MICHAEL DAVID ROBERTS,
Court Reporter
(Appearing by VTC)

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entire membership or whether it was just a vote for the board of directors, and it doesn't say.

So my question to you, do you have proof of the meeting other than what's filed with the clerk of the court?

Q. I'm not trying to be rude --

A. Well, I'm --

Q. I'm not trying to be rude, but I'm not going to answer -- no, I'm not going to answer your questions because that's not my job. Ian knows that, and it's just going to make this thing last much longer than it needs to be.

A. Okay.

Q. Let me ask the question, answer it, we'll move on.

MR. FORD: Yeah, James isn't allowed to answer questions. It's kind of like an interview, and he gets to ask the questions.

THE WITNESS: Okay. Got you.

MR. FORD: His time will come.

BY MR. ELLIOTT:

Q. So what it actually says is that where -- the document says, the association as successor in interest to Lighthouse Company voted at its annual meeting on August 3rd, 1985 by

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unanimous vote to amend the covenants.

Now, you don't recall going to the meeting, right? You don't recall going to that meeting, right?

A. That's correct.

Q. Okay. But you don't know that all the members who were there failed -- didn't all vote for it?

A. I have no idea.

And as an aside, that would be no criteria for universal passage by all members, just by the ones who were there.

Q. It goes on to read, the declaration of covenants and restrictions for Sea Pines South Beach Owners' Association, Inc., as recorded in the Office of the Clerk of Court Beaufort County, South Carolina, in deed book 176 at page 203 are herewith amended as follows, to wit: Article one, section one, paragraph C, common properties is herewith amended by broadening the definition of common properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.

Did I read that right?

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Stanley S. Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; Peter Trager, and Vacation Inn, LLC, each both individually and derivatively, Plaintiffs, vs. Sea Pines South Beach Owners' Association, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL CASE NO.: 2021-CP-07-01655 **DEFENDANT'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT OR RECONSIDER**

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant Sea Pines South Beach Owners' Association, Inc. (the "Association") respectfully requests that this Court alter and/or amend its July 22, 2024 Order and Judgment (the "Order") finding in favor of Plaintiffs Stanley S. Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003 ("Stroup"); Peter Trager ("Trager"); and Vacation Inn, LLC ("Vacation Inn"), each both individually and derivatively (collectively, "Plaintiffs").

Based on the records and filings[1] before the Court, argument at the trial of the matter and any related appearances, proceedings before the Court on dispositive motions, and applicable case law, the Association respectfully contends the Court erred as a matter of law in its Order. Respectfully, the Association submits this Court overlooked, did not consider, misinterpreted, and

[1] Because this case went to bench trial on stipulated facts and exhibits, for ease of this Court's review, this filing references the Exhibits to the Joint Stipulations of Facts and Evidence for Purpose of Trial, filed with this Court on April 15, 2024 (the "Stipulation"). Copies of the specific Exhibits cited herein are also attached to this Motion, and all Stipulation Exhibits are incorporated herein by express reference.

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failed to rule upon issues raised by the Association that require finding in its favor.[2] For the reasons set forth herein, the Association requests this Court enter a new order finding in the Association's favor for any of the below grounds or, alternatively, modify the Order to narrow the scope of its overbroad ruling and injunctions.

INTRODUCTION

On May 3, 2024, this Court held a bench trial in the above-captioned case. On May 28, 2024, this Court issued a Form 4 Judgment ruling that not only should (1) the Association be prohibited and enjoined from levying assessments for the dredging of Braddock Cove's boat channels and waterways, but (2) it also should be prohibited and enjoined from levying any annual assessments until such time as the Association may own "Common Properties," a term defined in the Association's Declaration of Covenants and Restrictions (as modified, the "Covenants"). The Court further instructed Plaintiffs to prepare a proposed order reflecting the Court's decision. Pursuant to the Court's instruction, Plaintiffs prepared and submitted a proposed order finding in their favor and, which if entered by the Court, would broadly enjoin the Association from levying assessments until certain conditions were satisfied and which further proposed denying the Association's counterclaims and requests for relief. By correspondence dated July 5, 2024, the Association, through counsel, requested that any order to be entered by the Court address important points of law and affirmative defenses presented by the Association at trial which were omitted

[2] A number of Arguments related to the core issue in this case were both raised in the Association's initial Trial Brief Trial Brief, filed April 24, 2024 (the "Initial Trial Brief"), Corrected Trial Brief, filed April 28, 2024 (the "Trial Brief"), and Opposition to Plaintiffs' Trial Brief, filed April 29, 2024 (the "Opposition") *and* were ruled upon in the Court's Order. To the extent that any arguments were raised in prior briefing and addressed in the Order in favor of Plaintiffs, the Association respectfully requests the Court revisit the briefing and argument and find for the Association for the reasons previously presented. The remainder of this Motion is devoted to issues that previously raised but were either *not* ruled upon or were overlooked or misapprehended.

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from Plaintiffs' proposed order. On July 22, 2024, the Court entered its Order ruling in favor of Plaintiffs without modification and without addressing the concerns raised by the Association in its July 5, 2024 correspondence to the Court.

The Association now moves this Court to reconsider the rulings in its July 22, 2024 Order, including the overbreadth of the relief and injunctions granted to Plaintiffs. The Association additionally requests that this Court reconsider and address the following points raised by the Association both in trial and in its briefing, any of which could—and should—be dispositive in favor of the Association: (1) contract interpretation principles that the underlying Covenants must be read as a whole, inclusive of provisions indicating the purposes of the Association, such as preservation of property values; (2) the language in the Association's Certificate of Incorporation, providing that the purpose of the Association includes maintaining common properties for the benefit of the health and welfare of the members; (3) S.C. Code Ann. § 33-31-302, *et seq*. of the South Carolina Nonprofit Corporation Act, enumerating the broad powers held by non-profits like the Association; (4) the lack of any law cited by the Plaintiffs that the members of the Association cannot amend definitions in the Covenants; (5) lack of standing on the part of Plaintiffs to complain of procedural defects to the 1985 Modification; (6) statute of limitations/laches; (7) waiver; (8) ratification; (9) issue preclusion (collateral estoppel) and claim preclusion (*res judicata*); and (10) equitable estoppel.

Demonstrative of why the Association should have prevailed—and as was overlooked by the Court—is the fundamental point that without the ability to issue annual assessments such as the ones at issue in this case, the Association will never be able to exercise its valuable, albeit inchoate, right of first refusal and option to purchase (the "Purchase Option") the property described in Exhibit 31 to the Stipulation, inclusive of property that would become "Common

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Property" and, thereby, satisfy the very condition now being imposed by this Court for the levying of annual assessments. Respectfully, this Court's July 22 Order omits, overlooks, or misapprehends this fundamental and existential matter, as well as other critical issues, each of which are wholly dispositive in favor of the Association.

Accordingly, the Association respectfully requests the Order be amended and the judgment altered for the reasons set forth herein. Failing to do so will essentially rule the Association out of existence, preventing it from serving and furthering the purposes for which it was incorporated and it has aimed to protect and enhance since its incorporation almost 55 years ago.

FACTUAL BACKGROUND

As to factual background, of which this Court is already well informed, the Association incorporates herein the stipulated facts as recited in the Association's Trial Brief, the Association's Opposition, and the Stipulation itself. In summary, this dispute involves interpretation of the Covenants.[3] The Covenants govern the Association and cover approximately 500 properties. The Covenants, through their plain language, were created in furtherance of the stated desire to: "provide for the preservation of the values and amenities in [a planned unit development] community and for the maintenance of said parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhome areas, and other Common Properties for the benefit of said community."

"Common Property" is a definitional phrase, and consistent with the Association's inherent power and authority to define its Covenants and governance terms however it chooses within applicable legal constraints, the term "Common Property" was amended as part of the 1985

[3] The Covenants were recorded in Deed Book 176 at Page 203, on August 18, 1970 and were subsequently modified as recorded in Deed Book 435 at Page 532 on November 28, 1985.

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modification to the Covenants (the "Modification"), to *broaden* the definition to *include* "all boat channels, waterways, channel markers and salt marsh open spaces of Braddock Cove . . . ." Braddock Cove is a tidal creek near the Calibogue Sound that meanders for about a mile along properties owned by members of the Association and is a vital and integral part of the Association's community. Maintenance of Braddock Cove is the heart of this case, and the Association's ability to assist in ensuring its navigability through semi-regular dredging serves to enhance and further the purposes of the Association and to protect and preserve property values of Association members and amenities available to the community.

Also relevant to the pertinent issues in this case are the prior dredging assessments. As noted in the Association's Trial Brief, the Association members voted, overwhelmingly—by an average of over 86%—to approve dredging of Braddock Cove, not only in 2001, but also in 2013 and again in 2017. In 2001—16 years after the Modification—the members voted 239 in favor and 35 opposed. No person or entity challenged the 2001 special assessment, which was carried out as a result of the Modification challenged in this very lawsuit. In 2013, the vote was 287 in favor, 40 opposed (and 6 with no opinion). Again, no lawsuit or challenge. Significantly, one of the present Plaintiffs—Stanley Stroup—voted in favor of the special assessment for dredging in 2013. Then, most recently in 2017, the vote was 282 in favor with the remaining 34 opposed or of no opinion. Notably, the highest percentage by which a special assessment for a dredge passed occurred in this most recent 2017 vote and again, no lawsuit or challenge was brought. The Association has likewise helped replace a failing wood groin near South Beach and Braddock Creek, assisted in preserving a parcel for use as a park, and helped the Town of Hilton Head repair the Braddock Creek dam after it was destroyed by Hurricane Matthew. Dredging Braddock Creek

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is simply a continuation of the manner in which the Association has worked to protect property values for its members.

LEGAL STANDARDS

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988)); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2004) (holding that, if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a 59(e) motion . . . in order to preserve the issue for appellate review").

As to issues relative to statutory interpretation, such as application of Section 33-31-302 of the South Carolina Code and the applicable statutes of limitations: "Where the terms of the statute are clear, the court *must* apply those terms according to their literal meaning." *Brown v. S.C. Dep't of Health & Env't Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (emphasis added). It is similarly axiomatic that when interpreting a contract, such as the Covenants, it is to "be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997); *see also Stevens Aviation, Inc. v. DynCorp Int'l, LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." (quotation and internal quotation marks omitted)).

As to the equitable issues, affirmative defense, and issues related to interpretation and modification of the Covenants, this Court should rule upon and analyze these overlooked issues in

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its Order. *See, e.g.*, *Fishburne v. State*, 427 S.C. 505, 514, 832 S.E.2d 584 (2019) (incorporating prior "reminder" to circuit courts and parties that: "(1) specific findings of fact and conclusions of law [are] required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review" (quotation omitted)). Application of the statute of limitations and laches, doctrines of waiver and ratification, and other related doctrines and defenses as set forth below are entirely dispositive of Plaintiffs' claims. Accordingly, this Court should revisit those arguments; add the corresponding facts, analysis, and conclusions of law to its Order; and give effect to that reasoning and grant judgment to the Association.

ARGUMENT

Mirroring the Court's Form 4 Statement of Judgment, this Court's Order concludes and summarizes its rulings by stating:

> After careful consideration, based on the specific factual context presented at trial, the Court finds: (1) the Association may not legally assess Plaintiffs for dredging Braddock Cove's boat channels and waterways, and enjoining the Association from levying assessments for this purpose; and (2) the Association may not levy annual assessments on Plaintiffs until such time as it owns Common Properties, and enjoining the Association from levying annual assessments on them until such time as it owns Common Properties.

Respectfully, that cannot be the case. For the reasons set forth below, the Court's findings and conclusions, as a matter of fact or law, are legally incorrect. Plaintiffs have not, and cannot, provide applicable South Carolina law that prevents a community association from modifying its own covenants within the bounds of the law and then exercising those rights pursuant to those covenants, as modified.

Importantly, the two rulings above far exceed the relief Plaintiffs sought from the outset and essentially rule the Association out of existence, obviating its role beyond contributing to Braddock Cove dredging. *Compare* Compl. ¶¶ 52, 55 *with* July 22 Order. This is especially so

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because the Court's erroneous analysis or understanding of the Modification and Covenants led to the also erroneous ruling connecting annual assessments and the lack of property ownership.

I. Proper interpretation of the Covenants bars Plaintiffs' action.

a. The Covenants and Modification are valid under South Carolina law.

This Court's Order overlooks and misapprehends the appropriate manner in which these Covenants and valid amendments, including the Modification, should be analyzed. Covenants "'are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) (citation omitted). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "Restrictive covenants differ from contracts in that they 'run with the land,' meaning that they are enforceable by and against later grantees." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (citing *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 314–17, 181 S.E. 66, 69–70 (1935)).[4]

In this case, "the [C]ovenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change." Ex. 1 to Joint Stips. at Art. VIII, § 1. The Association brought to vote an amendment to the Covenants to broaden the definition of "Common Property" on August 3, 1985. Ex. 3 to Joint Stips. The members who voted did so unanimously in favor of amending the Covenants. *Id*. The Modification was filed with the Beaufort County Clerk of Court in Deed Book 433 Page 67 on October 22, 1985, and in Deed

[4] More specific analysis of the covenants under *Queen's Grant II Horizontal Property Regime* is contained within the Association's Trial Brief and Opposition and is incorporated herein.

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Book 435 page 532 on November 20, 1985. *Id*. Consistent with the Association's inherent power as a South Carolina non-profit and its purposes as set forth in its governance documents, the Modification broadened the definition of "Common Property" to "include all boat channels, waterways, channel markers, and salt marsh open space areas of Braddock Cove." *Id*.[5] This was not a "sea change"; instead, this amendment was fully in-line with existing language in the Covenants, providing for the "preservation of the values and amenities in said community and for the maintenance of said . . . lakes, boat docks, *boat channels*, . . . and other Common Properties." Ex. 1 to Joint Stips. at p.1 (emphasis added). *Prior to the 1985 Modification*, the preamble to the Covenants already likened boat channels to Common Properties for which the Association had the duty to maintain and protect.

Art. V, § 4 of the Covenants addresses special assessments for improvements and additions to Common Property. *Id.* at Art. V, § 4. That section grants the Association the power to levy special assessments upon its members to defray the costs of any construction or reconstruction project and any unexpected repairs (including replacement) of any described Common Property capital improvement, which includes the necessary fixtures and personal property relating to Common Property, so long as seventy-five percent (75%) of the members approve of the special assessment by vote at a duly called meeting. *Id*. Art. VII, § 1 of the Covenants requires 75% vote of the members at the duly called meeting of the Association. *Id*. The dredge assessments passed by an average of over 86% at the duly called meetings in 2001, 2013, and 2017.

The Order does not address the fact—and Plaintiffs cannot counter—that the primary purpose of the Association, as preeminently stated on the face of the Covenants, is to protect and

[5] There is no principle of law that prohibits the Association's ability to define the relevant terms in its Covenants, and Plaintiffs have failed to provide a citation to one.

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preserve the property values in the community over which the Association governs. *See* Ex. 1 to Joint Stips. at p.1 (noting preservation of values and amenities as part of purpose). The South Beach community is surrounded by water on three sides. Without the access to the water, the community is less attractive. Moreover, due to the proximity to the water including Braddock Cove, the value of the properties within the community enjoy an increased value. Because the primary purpose of the Association is to preserve the value of the properties in the South Beach community, the Association's ability under the Covenants to levy special assessments upon the requisite three-fourths vote of its members, is *intra vires*. In addition, even if a member does not own a boat or other marine craft, Braddock Cove, without the dredging, would be full of silt, mud, and other debris, and thus be a nuisance to those who both live in South Beach and who access the cove. Such a nuisance would have a negative effect on the value of the properties within and amenities afforded the community because South Beach would not be as desirable of a location.

These Covenants and Modification are clearly lawful. This Court's order does not reference Section 33-31-302 of the South Carolina Code, which broadly enumerates, without limitation, various of the powers held by non-profit corporations, like the Association. Section 33-31-302's plain text supports the Association's ability and determination to levy a special assessment for the dredging of Braddock Cove:

> Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation . . . to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located . . . [and] to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

S.C. Code Ann. §§ 33-31-302(4) & (18). The Official Comments to Section 33-31-302 state, in part, that this new version of the statute should be broadly interpreted and gives all non-profit corporations "unbridled power" to further their activities and affairs in any necessary or convenient matter consistent with the law.

Relatedly, there is *no* rule that says the definition of "Common Property" must be limited to deeded property.[6] The waterways are an integral part of the Association community, and the Association has a strong interest in maintaining the navigability of the Braddock Cove waterways. As in the Order itself, neither the Court nor the Plaintiffs can cite any law—and each has cited none—prohibiting the Association from amending the Covenants to include the waterways in the Covenants' definition of "Common Property." The Court ruled the Association was prohibited from enlarging the definition, but there exists no legal basis for such a ruling. More importantly, because South Carolina law does not prohibit it, the Covenants themselves determine what can be modified here. The language of the Covenants themselves makes clear that everything contained therein is considered a "Covenant" and thus subject to amendment, as occurred here.[7] There is nothing in the Covenants that forbids an amendment of the definition of "Common Property" to

[6] And, this argument wholly ignores the fact that there was a deed into the Association, appropriately and expressly referencing Braddock Cove and its relevant boundaries and unequivocally affixing a "Common Property" designation thereto. *See* Ex. 2 to Joint Stips., Quit-Claim Deed, recorded with the Beaufort County Register of Deeds in Book 435 at Page 529.

[7] This argument is briefed extensively in the Association's Opposition and those arguments are incorporated herein. For all these reasons, the Order should be modified to reflect this argument and reaffirm, as done in *Catwalk*, that the Covenants, Modification, and ability to levy special assessments are all valid and proper exercises of the Association's power and authority pursuant to both South Carolina law and the Covenants and the Association's other governance documents.

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include the waterways, and there can be no doubt that maintaining the navigability of the waterways is a vital concern to Association members.[8]

b. The Court's Order is overly broad and violates principles of contract interpretation.

The right to make annual assessments is integral to the purposes set forth in the Covenants (*see generally* Ex. 1 to Joint Stips.) and in its Certificate of Incorporation (*see generally* Ex. 4 to Joint Stips.),[9] and that right is vital to the continued existence of the Association. As noted above, the "whole document" must be both analyzed and given effect. However, the practical effect of this Court's order as it stands is to render portions of the Covenants a nullity—an improper and unsupportable result. The Court's Order goes far beyond a prohibition on levying assessments for the dredging of Braddock Cove and prevents the Association from levying any annual assessments necessary for its operation and continuing existence.

Additionally, the Community Service Association ("CSA") granted the Association a contingent Purchase Option relative to the formerly undeveloped parcel near South Beach. Ex. 31

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[8] In 2011, after an exhaustive study of the need and propriety of dredging the south Sea Pines waterways (which includes Braddock Cove Creek), the governing bodies of Sea Pines passed a joint resolution adopting the report of a specially empaneled waterways task force, which states:

> The Task Force considered the adverse effects of not dredging the Sea Pines Waterways including the effects on the Heritage Golf Tournament, tourism in general and more specifically . . . the South Beach Village . . . and the values of our homes . . . the Task Force concluded that there would be significant adverse effects if dredging were not conducted as soon as possible.

Ex. 32 to Joint Stips. ¶ 8.

[9] Consistent with the Covenants, the Association's Certificate of Incorporation sets forth the purpose of the Association to be: "improving, maintain and operating the common properties of the association for the benefit of the health, welfare and recreation of the members of the association." *Id.*

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to Joint Stips. ¶ 10. Without the ability to levy annual assessments[10]—as has properly been done for decades—the Association will be left entirely unable to conduct necessary business and effectuate portions of its own governing documents, let alone to ever exercise this granted, valuable Purchase Option. Because "[d]ocuments will be interpreted so as to give effect to all of their provisions, if practical," this Court's interpretation which renders useless the ability to levy assessments violates these principles of contract interpretation. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007); *see also Brady v. Brady*, 222 S.C. 242, 246–47, 72 S.E.2d 193, 195 (1952) ("Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together."). Resulting harm to the Association, while immediate, is incalculable.

The 1985 Modification was approved unanimously and added the Braddock Cove waterways to the definition of Common Property irrespective of who owns it. Braddock Cove, as noted, is integral to the Association's community and value. As a result of the authorities set forth above, the ability of an Association to assess its members—on vote of 75% or more—is vital and should be unencumbered. To that point, neither Plaintiffs nor this Court's Order cite any law that prevents the Association from carrying out this lawful exercise of its rights.

[10] Until recently, the Association's annual assessments were in the amount of $20 per year per lot / dwelling unit. For the current year, the annual assessments are in the amount of $23.

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To properly allow the Association to exist, continue maintaining Common Properties for the benefit of the health and welfare and consistent with its expressly stated purposes, exercise its valid rights as set forth by the Covenants and statute, and take other related actions such as the exercise of its valuable Purchase Option, the ability to conduct special assessments by vote of 75% of the members is vital and should not be infringed upon by action of this Court. The Court's erroneous and overbroad Order overlooks the basic principles of contract interpretation that authorize and protect the actions the Association has taken and must be allowed to continue to do so.

II. Plaintiffs have no standing to bring this suit to challenge the 1985 Modification.

Standing to sue is a basic prerequisite to bringing a lawsuit. *See generally Bodman v. State*, 403 S.C. 60, 66, 742 S.E.2d 363, 366 (2013) ("Standing to sue is a fundamental requirement in instituting an action."). Accordingly, where, as here, standing does not exist, a plaintiff's claims should be dismissed in their entirety. Each Plaintiff in this case acquired the property right on which they attempt to sue the Association *after* 1985, yet seek to challenge the August 3, 1985 Modification. And, their challenge is based on procedural arguments related to the vote and a purported lack of notice to Association members.

Fatally, these Plaintiffs have no standing to make such a challenge based on their taking of their property well after the Modification. Plaintiff Trager owns a 4% interest in certain real property with a mailing address of 1853 Beachside Tennis, 247 South Sea Pines Drive, Hilton Head Island, SC 29928. While Trager and his wife originally took title on September 20, 1983, that is not the property interest through which Trager has brought this lawsuit. Trager and his wife conveyed a 95% undivided interest in that property to Carolyn S. Trager, a 4% undivided interest to Peter S. Trager, and a 1% undivided interest to Jennifer Paige Trager Janco on **August 13, 2007**.

Joint Stips. ¶ 3. Likewise, Plaintiff Vacation Inn bought 1732 Bluff Villas, at 3 Braddock Bluff Dr., Hilton Head Island, SC 29928, in **2003**. Joint Stips. ¶ 4. Vacation Inn has owned numerous parcels in South Beach Marina Village, South Beach since 1994. Joint Stips. ¶ 5. Robert A, Gossett Jr. is the managing member of Vacation Inn. Joint Stips. ¶ 6. Plaintiff Stroup is the owner of certain real property with a mailing address of 1460 Sound Villas, 253 South Sea Pines Drive, Hilton Head Island, SC 29928. Stroup and his wife originally purchased this property in **2002** as joint tenants. Joint Stips. ¶ 2.

Accordingly, each Plaintiff took their property with *full notice* of the Covenants to which they were to be bound—of course, that is the purpose of covenants. As much as parties often seek to avoid covenants that later become inconvenient for any number of reasons, South Carolina courts are loathe to interpret them in the way that has occurred here. Moreover, as set forth above, the overwhelming majority of Association members—many of whom have been members since before the Modification—have regularly supported special assessments for dredging, including Plaintiff Stroup in 2013. Most important, however, is the fact every party to this case acquired their property interest *after* the Modification was made a part of the Covenants. Insofar as the Court finds the fact availing, some Plaintiffs appear to have acquired the property with at least constructive knowledge of the special dredging assessments.

This Court's Order does not address why or how Plaintiffs could have standing to bring this action and, on a post hoc basis, protest the 1985 Modification on procedural grounds. Accordingly, the Court should reconsider, alter, and amend its Order on this dispositive point, including analysis as to why Plaintiffs have no standing, and grant judgment to the Association.

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III. Plaintiffs' action is wholly time barred.

The applicable statute of limitations further presents an independent, alternative, and dispositive ground for which the Court should dispose of all of Plaintiffs' claims. Even with regard to equitable claims, "the statute of limitations may be applied by analogy in a court of equity." *Thomerson v. DeVito*, 430 S.C. 246, 251, 844 S.E.2d 378, 381 (2020); *see also McKinnon v. Summers*, 224 S.C. 331, 336–37, 79 S.E.2d 146, 148 (1953) (same). Such "analogy" applies more forcefully as a bar here where Plaintiffs proceeded to trial on a "breach of covenants in the nature of contract" claim[11] cloaked as an action for declaratory judgment in an effort to circumvent the applicable statutes of limitation for the concurrent legal relief in a breach of contract action. *See, e.g.*, *Cope v. Anderson*, 331 U.S. 461, 464 (1947) ("[E]quity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy."); *see generally Good Morning to You Prods. Corp. v. Warner-Chappell Music, Inc.*, CV 13-4460-GHK, 2013 WL 12138670, at *2 (C.D. Cal. Oct. 16, 2013) (reciting proposition "that a plaintiff may not circumvent an applicable statute of limitations by characterizing a claim as one for equitable relief" and that "where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy." (quotation omitted)); *MRI Broadway Rental, Inc. v. U.S. Mineral Prods. Co.*, 242 A.D.2d 440, 445 (N.Y. Sup. Ct. 1997) (barring equitable claims, by noting that "[i]t is settled law that an equitable remedy is not available to enforce a legal right that is itself barred by the statute of limitations" and that "[i]t was, therefore, quite apparent that plaintiff was, in essence, seeking to circumvent the statute of limitations bar . .

[11] *See* Compl. ¶¶ 48–51 (pleading (i) existence of a "valid and enforceable contract" embodied by the Covenants (¶ 48); (ii) breach by the Association by levying assessments (¶ 49); and (iii) resulting damage to the Plaintiffs (¶¶ 50–51).

. by merely recasting [the claims in equitable] terminology" (quotations omitted)); 30A C.J.S. *Equity* § 175 ("[W]here statute of limitations bars the legal remedy, it bars the equitable remedy in analogous cases or in reference to the same subject matter, and it also bars the equitable remedy where the legal and equitable claim so far correspond that the only difference is that the one remedy may be enforced in a court of law and the other in a court of equity.").

This lawsuit was filed on September 13, 2021. *See* Compl. The Modification occurred in August of 1985, and the last dredge assessment occurred in 2017. Subsection 15-3-530(1) of the South Carolina Code provides for the "general rule," three-year statute of limitations that applies to contracts, while subsection 15-3-520(b) of the South Carolina Code provides for a 20-year statute of limitations for "an action upon a sealed instrument." Here, if this action is purported to be brought as to the procedure and passing of the 1985 Modification, and even if the Modification qualifies as a "sealed document," the statute of limitations would have expired in 2005. And, that is assuming all prerequisites for suit under a sealed instrument are met. If that were not the case, the statute would run *even earlier*. Moreover, as to the last dredge assessment that was issued in 2017, then the applicable three-year statute of limitations would have run in 2020, not 2021, making Plaintiffs' claims time-barred.

Statutes of limitations exist for many reasons, including to allow an organization to conduct its activities with confidence in reliance on governing documents that have been in place and unchallenged for almost five decades, such as the Covenants and the Modification, which in this case, have been in place for 36 years. Statutes of limitations provide finality, and prevent perpetual second-guessing of actions. The Association's actions have been guided by the understanding, correctly so, that its Covenants and Modification were and are valid. Actions have been taken over *decades* with reliance on that conclusion. And, as noted below, Plaintiffs were aware of those

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actions well before this suit was brought. As to the Modification, Plaintiffs were likewise aware of its existence and import before taking current title to the properties pursuant to which they incorrectly claim standing. The prejudice to the Association by the Plaintiffs doing nothing to enforce their alleged rights is extreme. Like much of Hilton Head Island, the South Beach community has experienced an unprecedented number of real estate transactions over the years. People have moved to the community over the last 36 years with the belief that their community is creekside, not located on a mud flat, and that the Covenants and the Modification are wholly valid and enforceable.

Accordingly, this Court should reconsider, alter, and amend its judgment to give full force and effect to the applicable statutes of limitations that fully bar this action for the reasons set forth above.

IV. Laches and waiver also bar the Plaintiffs' action.

If the statute of limitations does not prohibit the Plaintiffs' action, the equitable doctrines of laches and waiver nevertheless bar Plaintiffs' claims. "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). And, "[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right" and can be express or implied through one's conduct. *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "As with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right." *Driver*, 317 S.C. at 479, 451 S.E.2d at 929.

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First, as to laches, it is clear Plaintiffs knew of their rights before bringing this suit—the Covenants have existed since before they took current title to their properties, the Modification existed before they took title to their properties, their properties were taken with record notice of both the Covenants and the Modification, and Plaintiffs even voted as to prior special assessments relative to dredging. There is no question they were fully apprised of the relevant facts. Yet, they delayed—unreasonably so—in bringing suit. *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993) (collecting cases as to reasonable delay, none of which reflect facts that would make delay reasonable here). Resulting prejudice to the Association is both clear and substantial, as Plaintiffs' delay has caused the Association to incur time and expense in litigating issues that had been settled for decades and will result in the inability to contribute to vital dredging of Braddock Cove and to levy assessments to effectuate the purposes of the Association and to protect the Associations' rights and interests, including its valuable Purchase Option. *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007) (noting prejudice is essential element of laches defense); *Richey v. Dickinson*, 359 S.C. 609, 613, 598 S.E.2d 307, 310 (Ct. App. 2004) (exploring prejudice as a result of unreasonable delay). Accordingly, as a result of Plaintiffs unreasonable failure to timely challenge the relevant actions, the doctrine of laches should have barred their suit altogether.

Second, the doctrine of waiver "should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992). The effect of wavier here would be exactly that, holding the Association harmless for conduct that was not, and never was, wrongful. As noted, "[w]aiver is the voluntary and intentional relinquishment of a known right" and "[a]cts that are inconsistent with the continued

assertion of a right may also give rise to a waiver." *Covil Corp. by & through Protopapas v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 436 S.C. 85, 93, 870 S.E.2d 191, 196 (Ct. App. 2022). For the exact same reasons that laches operates to bar this action, so does waiver. Through Plaintiffs' own conduct and notice of the very things they challenge, they failed to assert their rights. Setting aside the fact that the General Assembly's chosen statute of limitations has run, Plaintiffs should have brought suit at the time they first voted on a special dredge assessment, if the arguments that they have now raised are valid and justifiable. However, they did not do so. This failure to act constitutes waiver as it could be nothing else but the intentional relinquishment of rights they now claim to have. *Id*.

Accordingly, the July 22 Order should be amended to include analysis of laches and waiver and the judgment should be altered in favor of the Association.

V. The Modification and subsequent assessments were ratified by the members of the Association.

Additionally, and independently of the foregoing, the ratification by Association members is likewise entirely dispositive of the Plaintiffs' claims, including as to Plaintiffs' stated grievances regarding the Modification and the special assessments issued.

Any possible procedural flaws as to the Modification have been rendered nonconsequential and unactionable because the Association members' vote to approve the Modification ratified the prior action taken by the Association relative thereto. In addition, the subsequent votes approving the dredge projects in 2001, 2013, and 2017, based upon the power and authority set forth in the Covenants and the Modification, ratified any violative actions again both as to the Modification and the assessments.

"To ratify is to sanction or affirm, to give validity to something done for one by another." *Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 75, 138 S.E.2d 835, 837 (1964). Ratification is

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"express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). Additionally, ratification relies upon the assumption that no prior authority was present. *Certus Bank N.A. v. Bennett*, No. 2014-001248, 2016 WL 757501, at *3 (S.C. Ct. App. Feb. 24, 2016). "However, once a ratification has occurred, it is equivalent to original, prior, or previous authority." *Id*. Three elements are required: "(1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements." *Lincoln*, 300 S.C. at 191, 386 S.E.2d at 803 (citation omitted).

The Covenants' requirement of 75% voter approval with the appropriate quorum for passing special assessments for maintenance dredging is the same as the requirement for amending the Covenants. *See* Ex. 1 to Joint Stips., Art. VIII, § 1. In effect, passing special assessments is the practical equivalent of amending the Covenants to do so for each assessment. In this case, the Association members, *including the Plaintiffs*, accepted the benefits of dredging Braddock Cove waterways; had full knowledge of the special assessments for dredging assessments in 2001, 2013, and 2017; participated in meetings and voting; and paid their charges for the dredging. Such actions amount to full ratification thereby eliminating any viable after-the-fact procedural challenges thereto, especially this many years later. Accordingly, this Court should dismiss procedural challenges as a result of the later ratification.

VI. Collateral estoppel bars this action.

Collateral estoppel is a principal of law that prevents the litigation of an issue that was decided in a prior action. *Carolina Renewal, Inc. v. S. C. Dep't of Transp.*, 385 S.C. 550, 554 684 S.E.2d 779, 782 (Ct. App. 2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App.

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2009)). The asserting party must prove three requirements: (1) the present issue was actually litigated in the previous action; (2) the present issue was "directly determined in the prior action"; and (3) the issue was "necessary to support the prior judgment." *Id*. (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189–90 n.1 (Ct. App. 1984)). Traditionally, collateral estoppel required party mutuality to provide a bar to relitigating the issue. *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008). However, the modern approach relaxes the requirement of mutuality. *Id*. This Court's Order does not address the fact that all three elements were met by virtue of prior litigation in *Catwalk, LLC v. Sea Pines South Beach Owners' Association, Inc.*, C/A No. 2014-CP-07-01435 ("*Catwalk*").

a. Actually litigated.

The parties in *Catwalk* were subjected to the same Covenants at issue here. In that case, the Court determined that the Covenants—and by necessity—all of their amendments, including the Modification at issue here, encumbered the property of the Association members. Specifically included was the right, upon 75% vote, to levy special assessments. This is precisely the issue that was before this Court in this case. Various filings by the plaintiffs in *Catwalk* make issue of the assessments, specifically the Complaint and Motion for Summary Judgment. Ex. 26 to Joint Stips.; Defendants' Initial Trial Brief at 38 (page 8 of 14 of Motion for Summary Judgment attached to Initial Trial Brief); *Beall*, 281 S.C. at 372, 315 S.E.2d at 191 (noting issue actually litigated when question at issue was "one framed by the pleadings"). Thus, the issue of whether the Covenants (as modified by the Modification) gave the Association the right to impose assessments was plainly put in issue in *Catwalk* and as a result was "actually litigated." *See id*.

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b. Directly determined.

The issue, as set forth above, was in fact directly determined in *Catwalk*. One issue in *Catwalk*—which was asserted in the Complaint, supporting affidavit, and Motion for Summary Judgment—was the Association's ability to levy special assessments, including the cost of dredging, upon its members and their South Beach property. In affirming the circuit court on the issue, the Court of Appeals stated: "However, because the 1970 Covenants were specifically included in subsequent deeds of conveyance, the only reasonable inference is the 1970 Covenants remain in effect as to Appellants' properties." *Catwalk, LLC v. Sea Pines S. Beach Owners' Ass'n, Inc.*, No. 2016-000637, 2018 WL 774827, at *2 (S.C. Ct. App. Feb. 7, 2018) (footnote omitted). Thus, a South Carolina circuit court has previously ruled—and has been affirmed on appeal—on a finding that members of the Association are burdened by the Covenants, which at that time already included the Modification. *See* Ex. 27 to Joint Stips. (circuit court order finding no basis to invalidate Covenants and granting judgment to Association as a result).

c. Necessary to support the Judgment.

The final element a movant must establish to prove collateral estoppel is the necessity of the present issue to support the prior judgment. *Beall*, 281 S.C. at 372, 315 S.E.2d at 191. The issue of whether the Association members were subjected to, and encumbered by, the Covenants was the issue in *Catwalk* and was necessary to support the resulting judgment. The Court determined the Covenants encumbered the members' properties. Therefore, this element of collateral estoppel has been conclusively established.

Because all three elements of collateral estoppel have been met, Plaintiffs should have been estopped from re-litigating the issue of whether the Association may assess for maintenance dredging upon a 75%-member vote approval and the Order should be modified accordingly.

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VII. *Res judicata* bars this action.

This Court's Order likewise fails to address arguments as to *res judicata*. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *S.C. Pub. Int. Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (citing *Judy*, 393 S.C. at 172, 712 S.E.2d at 414). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id*. Not addressing this issue fails to give weight to "the fundamental purpose of *res judicata*, which is to ensure that 'no one should be twice sued for the same cause of action.'" *Judy*, 393 S.C. at 173, 712 S.E.2d at 414. "[F]inal judgment on the merits in a prior action will preclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." *Nelson v. QHG of S.C. Inc.*, 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003), *aff'd in part, rev'd in part on other grounds*, 362 S.C. 421, 426, 608 S.E.2d 855, 858 (2005).

Stated most simply, all of the above elements are met, and the Order should reflect that this action is barred. First, *Catwalk* was a final judgment on the merits, rendered by a court of competent jurisdiction and in accordance with due process requirements. It was also affirmed by the Court of Appeals.

Second, the parties were identical to, or in privity with, the parties in the prior action. Privity, with regard to *res judicata*, refers to the relationship of a party to the litigation's subject matter and "means one so identified in interest with another that he represents the same legal right." *Nelson*, 354 S.C. at 309, 580 S.E.2d at 181. Plaintiff Vacation Inn and the Association are parties identical in both the prior *Catwalk* decision and in the present action. Furthermore, Plaintiffs

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Stroup and Trager are in privity with Plaintiff Vacation Inn because all three Plaintiffs are real property owners within the Association, are subject to the same Covenants and the Modification, and inherent thereto are so identified in interest with one another and other members of the Association so as to represent the same legal rights.

Third, and finally, plaintiffs in *Catwalk* sought a declaratory judgment that: (1) plaintiffs' real property was not encumbered by the Covenants; (2) plaintiffs are not members of the Association; and (3) plaintiffs have no liability for assessments made or imposed by the Association. Ex. 26 to Joint Stips. Additionally, they sought an injunction to prevent the levying of special assessments for the dredging of Braddock Cove. *Id.* There are two causes of action in the present case: (1) Breach of Covenants in the Nature of Contract and (2) Injunction and Declaratory Judgment. *See* Compl. The injunctive relief stems from the levying of general annual assessments and special assessments for the Braddock Cove dredging project and the declaratory judgment stems from the alleged inability of the Association to levy general annual assessments and special assessments for Braddock Cove dredging projects. In their motion for summary judgment in *Catwalk*, Vacation Inn admitted that the assessments at issue in *Catwalk* included the special assessments that were levied to fund the earlier Braddock Cove Creek dredge project. Defendants' Initial Trial Brief at 38 (page 8 of 14 of Motion for Summary Judgment attached to Initial Trial Brief). Because the claim in the present case—that the Association cannot levy special assessments for the dredging of Braddock Cove nor general annual assessments—is based upon the same cause of action involved in the prior *Catwalk* decision, the third *res judicata* condition is met.

Accordingly, this Court's Order should be modified to reference the fact that all conditions of *res judicata* have been met and this action is barred.

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VIII. Equitable estoppel likewise bars this action.

"Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009); *Lee v. Southern Railway Co.,* 228 S.C. 240, 89 S.E.2d 431 (1955); *Janasik v. Fairway Oaks Villas Horizontal Property Regime,* 307 S.C. 339, 415 S.E.2d 384 (1992). It may arise even though there was no intention by the party to relinquish or change any existing rights. The essential element of estoppel is prejudice to the party raising the defense. *Id.*

"The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). Here, Plaintiffs slept on their arguments for years, in essence conveying the impression that there was no dispute as to the validity of the Modification or the Covenants themselves. This could only have been done knowing the Association would rely on such continued assent, especially in light of the fact at least one Plaintiff voted in favor of a prior special dredge assessment. And, the entire time, Plaintiffs had knowledge of facts that could have given rise to this action under an appropriate timeframe.

On a reciprocal basis, and for the same reasons, the Association lacked knowledge of what has been asserted to be factual in this lawsuit; the Association has relied on the prior conduct and silence of the Plaintiffs and its other members; and has suffered prejudice from the Plaintiffs' fresh attacks on historical facts and immutable actions taken, approved, and ratified long ago.

Plaintiffs benefit, and have benefitted in the past, from the actions of the Association, including funding of the dredging of Braddock Cove, and should have been estopped from any relief. Many owners have bought property in South Beach since 1985. They have done so with the knowledge that they can choose by their vote whether to maintain the navigability of Braddock Cove by funding the dredge. What they did not buy with knowledge of is the idea that three owners, because they did not get their way, can subvert the will of the substantial majority exerted through a proper process. Of course, under South Carolina law, the three Plaintiffs cannot subvert the legal actions of the Association. Moreover, given that the three Plaintiffs waited 36 years and gained an interest in property after the Modification and after special assessments were issued, they should be estopped from contesting the initiatives now. The Association has a right to conduct activities and plan for the future based on a reliance on provisions of their Covenants and all amendments that have been in place for 36 years.

Accordingly, the Order should be modified to reflect the fact equitable estoppel should operate to bar this action.

IX. In the alternative, the Court should modify its Order.

Alternative to all the grounds listed above by which the Court should find in favor of the Association, the Court should revise its order to more narrowly tailor its injunctions. The practical implication of the Order as it stands is to wholly prevent the Association from making its regular, annual assessments and thereby conducting its normal business which has continued unabated for decades. Because this is inappropriate, unsupported by applicable law, and incongruous with the relief requested by Plaintiffs, the Court—in the alternative to finding in favor of the Association should it refuse to do so upon reconsideration—should limit its relief to enjoining only special dredge assessments.

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CONCLUSION

For the reasons set forth above, Defendant Sea Pines South Beach Owners' Association, Inc., respectfully requests this Court reconsider, alter, and amend its July 22, 2024 Order to grant judgment in favor of the Association for any, or all, of the reasons set forth herein or for the reasons set forth in prior briefing or at trial. Alternatively, as a matter of preservation, if the Court adopts its prior Order and Judgment in favor of Plaintiffs in response to this Motion, the Court should modify its Order and expressly rule upon each of the Association's affirmative defenses and arguments addressed herein, which were overlooked, not considered, and misinterpreted, and upon which the Court failed to rule.

RICHARDSON PLOWDEN & ROBINSON, P.A.

s/ James H. Elliott, Jr.
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ATTORNEY FOR DEFENDANT SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.

August 1, 2024

Amended Restrictions 132/260

Exhibit
Stipulation of Facts
1
exhibitsticker.com

Exhibit
Stroup Motion Summary Judgment
1
exhibitsticker.com

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PART I
DECLARATION OF COVENANTS AND RESTRICTIONS FOR
SEA PINES SOUTH BEACH, HILTON HEAD ISLAND, SOUTH CAROLINA
AND
PROVISIONS FOR THE SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.

THIS DECLARATION, made this 25th day of June, A. D., 1970, by LIGHTHOUSE BEACH COMPANY, a South Carolina Limited Partnership with its principal place of business at Hilton Head, South Carolina, hereinafter called Company.

WITNESSETH:

WHEREAS, Company is the owner of the real property described in Article II of this declaration and desires to create thereon a planned unit development community known as South Beach with permanant parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhouse areas, and other Common Properties for the benefit of the said community; and

WHEREAS, Company desires to provide for the preservation of the values and amenities in said community and for the maintenance of said parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhouse areas, and other Common Properties; and, to this end, desires to subject the real property described in Article II, together with such additions as may hereafter be made, as provided in Article II, to the covenants, restrictions, easements, affirmative obligations, charges, and liens, hereinafter set forth, each and all of which is and are hereby declared to be for the benefit of said property and each and every owner of any and all parts thereof; and

WHEREAS, Company has deemed it desirable, for the efficient preservation of the values and amenities in said community, to create an agency to which should be delegated and assigned the power and authority of maintaining and administering the Common Properties and administering and enforcing the covenants and restrictions governing the same and collecting and disbursing all assessments and charges necessary for such maintenance, administration and enforcement, as hereinafter created; and

WHEREAS, Company has caused to be incorporated under the laws of the State of South Carolina, as a non-profit corporation, SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., for the purpose of exercising the functions aforesaid, and which are hereinafter more fully set forth.

NOW, THEREFORE, the Company declares that the real property described in Article II, and such additions thereto as may hereafter be made pursuant to Article II hereof, is and shall be held, transferred, sold, conveyed, leased, occupied, and used subject to the covenants, restrictions, conditions, easements, charges, assessments, affirmative obligations, and liens (sometimes referred to as "the covenants") hereinafter set forth.

ARTICLE I
DEFINITIONS

Section 1. The following words and terms, when used in this Declaration, or any Supplemental Declaration (unless the context clearly shall indicate otherwise) shall have the following meanings:

(a) "Association" shall mean and refer to the Sea Pines South Beach Owners' Association, Inc., a South Carolina non-profit corporation.

Owners' Association, Inc., a South Carolina non-profit corporation.

(b) The "Properties" shall mean and refer to the Existing Property described in Article II hereof, and additions thereto, as are subject to this Declaration or any Supplemental Declaration under the provisions of Article II hereof.

(c) "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties". The term "Common Properties" shall include any personal property acquired by the Association if said property is designated as "Common Property". All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties, subject to the fee schedules and operating rules adopted by the Association.

(d) "Lot" shall mean and refer to any improved or unimproved plat of land shown upon any recorded final subdivision map of any part of the Properties with the exception of Common Properties as heretofore defined.

(e) "Dwelling Unit" shall mean and refer to any portion of any building situated upon the Properties designed and intended for use and occupancy by a single family. "Dwelling Unit" shall include, without limiting the term, each apartment in any Multi-family structure, each town house (when two or more are located on a single lot), and each unit in a residential condominium.

(f) "Multi-family Structure" shall mean and refer to any building containing two or more Dwelling Units under one roof except when each Dwelling Unit is situated upon its own individual lot.

(g) "Owner" shall mean and refer to the record owner, whether one or more persons, firms, associations, corporations or other legal entities, of the fee simple title to any Lot or Dwelling Unit situated upon the Properties but, notwithstanding any applicable theory of a mortgage, shall not mean or refer to the mortgagee unless and until such mortgagee has acquired title pursuant to foreclosure proceedings or any proceeding in lieu of foreclosure; nor shall the term "owner" mean or refer to any lessee or tenant of an Owner.

(h) "Member" shall mean and refer to all those Owners who are Members of the Association as provided in Section 1 of Article III hereof.

(i) "Company" shall mean the Lighthouse Beach Company and its successors and assigns.

ARTICLE II

Section 1. Existing Property. The real property which is, and shall be held, transferred, sold, conveyed, leased and occupied, subject to these covenants, is located on Hilton Head Island, Beaufort County, South Carolina, and is more particularly described in Exhibit A hereto attached and by reference incorporated herein. All of the real property hereinabove described shall hereinafter be referred to as "Existing Property". The Company intends to develop the Existing Property in accordance with its Master Plan dated March 15, 1970. However, the Company reserves the right to review and modify the Master Plan from time to time based on its continuing research and design program.

Unless otherwise stated therein, the Master Plan shall not bind the Company, its successors and assigns to adhere to, the Master Plan in the development of the land shown thereon. Subject to its right to modify the Master

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development of the land shown thereon. Subject to its right to modify the Master Plan as stated herein, the Company will convey the common Properties shown on the Master Plan to the Association as provided in Article IV, Section 2. It also shall be understood that the Company shall be free to develop such portions or sections of the lands depicted in the Master Plan, as, in the reasonable exercise of its discretion, it deems in the best interest of the entire development, without regard to the relative location of such portions or sections within the overall plan; that it shall not be required to follow any predetermined sequence or order of improvements and development; and that it may bring within the plan of these covenants additional lands, and develop the same before completing the development of the existing property.

Section 2. Additions to Existing Property. Additional lands may become subject to this Declaration in the following manner:

(a) Additions. The Company, its successors, and assigns, shall have the right, without further consent of the Association, to bring within the plan and operation of this Declaration, additional properties in future stages of the development.

The additions authorized under this and the succeeding sub-section, shall be made by filing of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.

The Supplementary Declaration may contain such complementary additions and modifications of the covenants and restrictions contained in this Declaration as may be necessary or convenient, in the judgment of the Company, to reflect the different character, if any, of the added properties and as are not inconsistent with the Plan of this Declaration.

(b) Other Additions. Upon approval in writing of the Association pursuant to three-fourths of the vote at a duly called meeting, the owner of any property other than the Company who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.

The Supplementary Declaration may contain such complementary additions and modifications of the covenants and restrictions contained in this

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Declaration as may be necessary or convenient, in the judgment of the Company, to reflect the different character, if any, of the added properties and as are not inconsistent with the Plan of this Declaration.

(c) Mergers. Upon a merger or consolidation of the Association with another association as provided for in the By-Laws of The Association, its properties, rights and obligations may, by operation of law, be transferred to another surviving or consolidated association, or, in the alternative, the properties, rights and obligations of another association may, by operation of law, be added to the properties of the Association as a surviving corporation pursuant to a merger. The surviving or consolidated association may administer the covenants and restrictions established by this Declaration within the Existing Property, together with the covenants and restrictions established upon any other properties as one plan. No such merger or consolidation, however, shall effect any revocation, change of or addition to the Covenants established by this Declaration within the Existing Property as herein provided.

ARTICLE III
MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION

Section 1. Membership. The Company and every person or entity who is a record owner of a fee simple or undivided fee simple interest in any Lot or Dwelling Unit which is subject by the Covenants to assessment by the Association shall be a member of the Association, provided that any such person or entity who holds such title or interest merely as a security for the performance of an obligation shall not be a member of the Association.

Section 2. Voting Rights. The Association shall have two (2) classes of voting membership:

CLASS "A" — Class A Members shall be all those owners as defined in Section One (1) with the exception of the Company. Class "A" Members shall be entitled to one vote for each Lot and Dwelling Unit in which they hold the interest required for membership by Section One (1). When more than one person holds such interest or interests in any Lot or Dwelling Unit all such persons shall be members, and the vote for such lot or dwelling unit shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any such Lot or Dwelling Unit. A Member casting a vote representing a Dwelling Unit owned by such Member shall not be entitled to cast an additional vote for the Lot upon which said Dwelling Unit is situated. In the event a single Dwelling Unit is sold in fee with a Lot, the vote with respect thereto shall thereafter be cast on the basis of the Dwelling Unit only. When one or more co-owners sign a proxy or purports to vote for his or her co-owners, such vote shall be counted unless one or more of the other co-owners is present and objects to such vote, or if not present, submits a proxy or objects in a writing delivered to the Secretary of the Association before the vote is counted. If co-owners disagree as to the vote, the vote shall be split equally among the co-owners.

CLASS "B" — The Class B Member shall be the Company. The Class B Member shall be entitled to one vote plus one vote for each vote held by a Class A Member. One vote of the Class A Membership shall be equivalent to one vote of Class B Membership. The total vote of the Association shall consist of the sum of the votes of Class A Members and of the votes of Class B Members.

ARTICLE IV
PROPERTY RIGHTS IN THE COMMON PROPERTIES

Section 1. Member's Easements of Enjoyment. Subject to the provisions of these covenants and the rules and regulations of the Association, every Member shall have a right and easement of enjoyment in and to the Common Properties and

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shall have a right and easement of enjoyment in and to the Common Properties and such easement shall be appurtenant to and shall pass with the title of every Lot or Dwelling Unit.

Section 2. Title to Common Properties. The Company may retain the legal title to the Common Properties until such time as it has completed improvements thereon and until such time as, in the opinion of the Company, the Association is able to maintain the same, but notwithstanding any provision herein, the Company hereby covenants, for itself, its successors and assigns that it shall convey the Common Properties to the Association within one hundred and eighty (180) days of the time they are completed. Said Common Properties may be conveyed subject to all restrictive covenants of record.

Section 3. Extent of Member's Easements. The rights and easements of enjoyment created hereby shall be subject to the following:

(a) The right of the Company and of the Association, in accordance with its By-Laws, to borrow money for the purpose of improving the Common Properties and in aid thereof to mortgage said properties.

(b) The right of the Association to take such steps as are reasonably necessary to protect the above described properties against foreclosures; and

(c) The right of the Association, as provided in its By-Laws, to suspend the enjoyment of rights of any member for any period during which any assessment remains unpaid, and for any period not to exceed thirty (30) days for any infraction of its published rules and regulations, it being understood that any suspension for either non-payment or any assessment or a breach of the rules and regulations of the Association shall not constitute a waiver or discharge of the Member's obligation to pay the assessment; and

(d) The right of the Association to charge reasonable admission and other fees for the use of the Common Properties and/or facilities therein; and

(e) The right of the Company to dedicate or transfer to any public or private utility, utility easements on any part of the Common Properties.

(f) The right of the Association to give or sell all or any part of the Common Properties including leasehold interest to any public agency, authority, or utility or private concern for such purposes and subject to such conditions as may be agreed to by the Members, provided that no such gift or sale or determination as to the purposes or as to the conditions thereof, shall be effective unless such dedications, transfer and determination as to purpose and conditions shall be authorized by the vote of three-fourths (3/4) of the vote at a duly called meeting and unless written notice of the proposed agreement and action thereunder is sent to every Member at least thirty (30) days in advance of any action taken. A true copy of such resolution together with a certificate of the result of the vote taken thereon shall be made and acknowledged by the President or Vice-President and Secretary or Assistant Secretary of the Association and such certificate shall be

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annexed to any instrument of dedication or transfer affecting the Common Properties, prior to the recording thereof. Such certificate shall be conclusive evidence of authorization by the membership.

ARTICLE V
COVENANT FOR MAINTENANCE ASSESSMENTS

Section 1. Creation of the Lien and Personal Obligation of Assessments. The Company for each Lot and Dwelling Unit owned by it within The Properties hereby covenants and each Owner of any Lot or Dwelling Unit shall by acceptance of a deed therefor, whether or not it shall be so expressed in any such deed or other conveyance, be deemed to covenant and agree to all the terms and provisions of these covenants and to pay to the Association: (1) Annual assessments or charges; (2) Special Assessments for the purposes set forth in Section 4 of this Article, such assessments to be fixed, established and collected from time to time as hereinafter provided. The Annual and Special assessments together with such interest thereon and costs of collection therefor as hereinafter provided, shall be a charge and continuing lien on the land and all the improvements thereon against which each such assessment is made. Each such assessment, together with such interest thereon and cost of collection thereof as hereinafter provided, shall also be the personal obligation of the person who was the owner of such property at the time when the assessment fell due. In the case of co-ownership of a Lot or Dwelling Unit, all of such co-owners of the Lot or Dwelling Unit shall be jointly and severally liable for the entire amount of the assessment.

Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.

The Special Assessments shall be used for the purposes set forth in Section 4 of this Article.

Section 3. Basis and Maximum of Annual Assessments. Until the year beginning January 1, 1973, the annual assessments shall not be more than five and no/100 ($5.00) dollars per month per Lot or Dwelling Unit unless a higher annual assessment is approved by three-fourths (3/4) of the vote at the annual meeting. The owner of one or more Dwelling Units who also owns the Lot upon which said one or more Dwelling Units are located shall pay one assessment for each Dwelling Unit but shall not be assessed for the Lot upon which the Dwelling Units are located. From and after January 1, 1973, the annual assessment may be increased each year by five percent (5%) of the maximum authorized assessment for the preceding year unless three-fourths (3/4) of the vote at the annual meeting votes against said increase or votes to increase said annual assessment by a greater amount or to decrease the annual assessment.

The Board of Directors of the Association may, after consideration of current maintenance costs and future needs of the Association, fix the annual assessment for any year at a lesser amount, but such action shall not constitute a waiver by the Association of its right to revert to the full assessment for the remaining

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year or years of the then current period fixed as provided in the preceding paragraph.

Section 4. Special Assessments for Improvements and Additions. In addition to the annual assessments authorized by Section 3 hereof, the Association may levy special assessments; for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, unexpected repair or replacement of a described capital improvement upon the Common Properties, including the necessary fixtures and personal property related thereto or addition to the Common Properties, provided that any such assessment shall have the assent of three-fourths (3/4) of the vote at a duly called meeting, written notice of which shall be sent to all Members at least thirty (30) days in advance and shall set forth the purpose of the meeting.

Section 5. Change in Basis and Maximum of Annual Assessments Upon Merger of Consolidation. The limitations of Section 3 hereof shall not apply to any change in the maximum and basis of the assessments undertaken as an incident to a merger or consolidation in which the Association is authorized to participate under Article 2, Section 2, hereof, and under the By-Laws of the Association.

Section 6. Quorum for any Action Authorized. The presence at the meeting of Members or of proxies, entitled to cast sixty (60%) percent of the total vote of the membership shall constitute a quorum. If the required quorum is not forthcoming at a meeting, another meeting may be called, subject to the notice requirement set forth in Section 4.

Section 7. Date of Commencement of Annual Assessments. Due Dates. The annual assessments provided for herein shall commence on the date (which shall be the first day of a month) fixed by the Board of Directors of the Association to be the date of commencement.

The first annual assessments shall be made for the balance of the calendar year and shall become due and payable on the day fixed for commencement. The assessments for any year, after the first year, shall become due and payable the first day of January of said year.

The amount of the annual assessment which may be levied for the balance remaining in the first year of assessment shall be an amount which bears the same relationship to the annual assessment provided for in Section 3 hereof, as the remaining number of months in that year bear to twelve. The same reduction in the amount of the assessment shall apply to the first assessment levied against any property which is hereafter added to the properties now subject to assessment at a time other than the beginning of any assessment period.

The due date of any special assessment under Section 4 hereof shall be fixed in the resolution authorizing such assessment.

Section 8. Duties of the Board of Directors. The Board of Directors of the Association shall fix the date of commencement and the amount of the assessment against such Lot or Dwelling Unit for each assessment period and shall, at that time, prepare a roster of the properties and assessments applicable thereto which shall be kept in the office of the Association and shall be open to inspection by any Owner.

Written notice of the assessment shall thereupon be sent to every Owner subject thereto.

The Association shall upon demand at any time furnish to any Owner liable

The Association shall upon demand at any time furnish to any Owner liable for said assessment a certificate in writing signed by an officer of the Association, setting forth whether said assessment has been paid. Such certificate shall be conclusive evidence of payment of any assessment therein stated to have been paid.

Section 9. Effect of Non-Payment of Assessment. The personal obligation

of the Owner; The Lien; Remedies of Association. If the assessments are not paid on the date when due (being the dates specified in Section 7 hereof), then such assessment shall become delinquent and shall, together with such interest thereon at the rate of eight (8%) percent per annum from the due date and cost of collection thereof as hereinafter provided, thereupon become a charge and continuing lien on the land and all improvements thereon, against which each such assessment is made, in the hands of the then Owner, his heirs, devisees, personal representatives and assigns. The personal obligation of the Owner at the time of the assessment to pay such assessment, however, shall remain his personal obligation for the statutory period and shall not pass as a personal obligation to his successors in title unless expressly assumed by them.

If the assessment is not paid within thirty (30) days after the due date, the Association may bring an action at law against the Owner personally obligated to pay the same or to foreclose the lien against the property, and there shall be added to the amount of such assessment the costs of preparing and filing the complaint in such action, and in the event a judgment is obtained, such judgment shall include interest on the assessment as above provided and a reasonable attorney's fee to be fixed by the court together with the costs of the action.

Section 10. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any mortgage or mortgages now or hereafter placed upon the properties subject to assessment; provided, however, that such subordination shall apply only to the assessments which have become due and payable prior to a sale or transfer of such property pursuant to a decree of foreclosure, or any other proceeding in lieu of foreclosure. Such sale or transfer shall not relieve such property from liability for any assessments thereafter becoming due, nor from the lien of any such subsequent assessment.

Section 11. Exempt Property. The following property, individuals, partnerships or corporations, subject to this Declaration shall be exempted from the assessment, charge and lien created herein:

(a) The grantee of property over which said grantee holds a utility easement;

(b) All properties to the extent of any easement therein other than a

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an easement which does not adversely affect the owner's use of the property;

(c) All Common Properties as defined in Article I, Section 2, hereof;

(d) All properties exempted from taxation by the laws of the State of South Carolina, upon the terms and to the extent of such legal exemptions;

(e) Properties owned by the Company used for recreation facilities; home and villa maintenance and service; meeting room and conference facilities and Dwelling Units occupied by the service and operating staff. Only land within the Existing Property which has been sub-divided into Lots, and the plats thereof filed for public record in the Beaufort County Court House shall constitute a Lot for purposes of these assessments. Projected Locations for future platted lots shown on the Master Plan will not be subject to assessment.

ARTICLE VI
Pparty WALLS

Section 1. General Rules of Law to Apply. Each wall which is built as a part of the original construction of the homes upon The Properties and placed on the dividing line between the Lots shall constitute a party wall, and to the extent not inconsistent with the provisions of this Article, the general rules of law regarding party walls and of liability for property damage due to negligent or willful acts or omissions shall apply thereto.

Section 2. Sharing of Repair and Maintenance. The cost of reasonable repair and maintenance of a party wall shall be shared by the Owners who make use of the wall in proportion to such use.

Section 3. Destruction by Fire or other Casualty. If a party wall is destroyed or damaged by fire or other casualty, any Owner who has used the wall may restore it, and if the other Owners thereafter make use of the wall, they shall contribute to the cost of restoration thereon in proportion to such use without prejudice, however, to the right of any such Owners to call for a larger contribution from the others under any rule of law regarding liability for negligent or willful acts or omission.

Section 4. Weatherproofing. Notwithstanding any other provision of this Article, an Owner who by his negligent or willful act causes the party wall to be exposed to the elements shall bear the whole cost of furnishing the necessary protection against such elements.

Section 5. Right to Contribution Runs with Land. The right of any Owner to contribution from any other Owner under this Article shall be appurtenant to the land and shall be an obligation running with the land and shall pass to such Owner's successors in title.

Section 6. Arbitration. In the event of any dispute arising concerning a party wall, or under the provisions of this Article, each party shall choose one arbitrator, and such arbitrators shall choose one additional arbitrator, and the decision of the majority of all the arbitrators shall be final and conclusive of the question involved.

ARTICLE VII
ARCHITECTURAL CONTROL

Section 1. Review and Approval of Landscaping Specifications for Additions, Alterations or Changes to Structures. No building, wall, fence, swimming pool, or other structure shall be commenced, erected, or maintained upon

swimming pool, or other structure shall be commenced, erected, or maintained upon the Common Properties, nor shall any landscaping be done, nor shall any exterior addition to any such existing structure or change or alteration therein, be made until the plans and specifications therefor showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to the harmony and compatability of its external design and location, with the surrounding structures and topography, by Lighthouse Beach Company and its duly appointed agent.

ARTICLE VIII
GENERAL PROVISIONS

Section 1. Duration and Amendments. The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association, the Developer, or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successors, and assigns, for a term of twenty (20) years from the date this Declaration is recorded, after which time said covenants shall be automatically extended for successive periods of ten (10) years unless three-fourths (3/4) of the vote at the annual meeting approves a change in the covenants and restrictions. The covenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change. Provided, however, that no such agreement to change shall be effective unless made and recorded sixty (60) days in advance of the effective date of such change, and unless written notice of the proposed agreement is sent to every Owner of a Lot or Dwelling Unit and the Company at least thirty (30) days in advance of any action taken. During the period ending one year from the date these covenants are recorded the Company may amend or add to these covenants, without the consent of the membership, to clarify or make provision for any items which the Company in its sole discretion considers necessary or desirable. The Company shall not, by reason of the power herein reserved, have the right to alter the amount, or method of making, annual or special assessments.

Section 2. Notices. Any notice required to be sent to any Member or Owner under the provisions of this Declaration shall be deemed to have been properly sent, and notice thereby given, when mailed, postpaid, to the last known address of the person who appears as Member or Owner on the records of the Association at the time of such mailing. Notice to one of two or more co-owners of a Lot or Dwelling Unit shall constitute notice to all co-owners. It shall be the obligation of every Member to immediately notify the Secretary of the Association in writing of any change of address.

Section 3. Enforcement. Enforcement of these covenants and restrictions shall be by any proceeding at law or in equity against any person or persons violating or attempting to violate or circumvent any covenant or restriction, either to restrain violation or to recover damage, and against the land to enforce any lien created by

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these covenants; and failure by the Association or any Owner or the Company to enforce any covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce same thereafter.

Section 4. Severability. Should any covenant or restriction herein contained, or any Article, Section, Sub-section, sentence, clause, phrase or term of this Declaration be declared to be void, invalid, illegal, or unenforceable, for any reason, by the adjudication of any court or other tribunal having jurisdiction over the parties hereto and the subject matter hereof, such judgment shall in no wise affect the other provisions hereof which are hereby declared to be severable, and which shall remain in full force and effect.

IN WITNESS WHEREOF the Developer has caused this instrument to be executed the day and year first above written, by its president and attested by its secretary, and the corporate seal affixed, pursuant to a resolution duly and unanimorsly adopted by its Board of Directors.

WITNESSES:

BY: LIGHTHOUSE BEACH COMPANY
SEA PINES MANAGEMENT COMPANY, INC.
GENERAL PARTNER

Carolyn Warren

By: Charles E. Fraser
As its President

Connie D. Herrman

By: D. L. McCrary
As its Secretary

The foregoing Declaration of Covenants and Restrictions is hereby approved and accepted as binding upon South Beach Owners Association, Inc., its successors and assigns.

IN WITNESS WHEREOF, South Beach Owners Association, Inc., has caused this instrument to be executed this 25th day of June, 1970, by its president and attested by its secretary, and its corporate seal to be hereto affixed.

WITNESSES:

SOUTH BEACH OWNERS ASSOCIATION, INC.

Carolyn Warren

By: [signature]
As its President

Connie D. Herrman

By: D. L. McCrary
As its Secretary

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

PROBATE

PERSONALLY appeared before me Carolyn Warren who, on oath, says that he saw the within named Lighthouse Beach Company by Sea Pines Management Company, Inc., General Partner, by Charles E. Fraser, its President and D. L. McCrary, its Secretary, sign the within instrument, and the said corporation, by said officers, seal said instrument and as its act and deed, deliver the same, and that he with Connie D. Herrman witnessed the execution thereof.

Carolyn Warren

SWORN to before me this

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SWORN to before me this

25th day of June, 1970.

Connie D. Herrman
Notary Public for South Carolina

My Commission Expires
October 14, 1978

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF BEAUFORT)

PERSONALLY appeared before me Carolyn Warren who, on oath, says that he saw the within-named South Beach Owners Association, Inc. by Harold Depkin its President and D. L. McCrary, its Secretary, sign the within instrument, and the said corporation, by said officers, seal said instrument and as its act and deed, deliver the same, and that he with Connie D. Herrman witnessed the execution thereof.

Carolyn Warren

SWORN to before me this

25th day of June, 1970.

Connie D. Herrman
Notary Public for South Carolina

My Commission Expires
October 14, 1978

EXHIBIT A

All that certain piece, parcel or block of land situate, lying and being on Hilton Head Island, in Beaufort County, South Carolina, shown and designated as South Beach on plat thereof recorded in the Office of the Clerk of Court for Beaufort County, South Carolina in Plat Book 18 at Page 126.

FILED AT 3:35 O'CLOCK P M
BEAUFORT COUNTY S. C.
AUG 18 1970
RECORDED IN BOOK 176 PAGE 203
Bev Trueblood
CLERK OF COURT OF COMMON PLEAS
D.C.

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Exhibit
Stroup Motion Summary Judgment
2
exhibitsticker.com

Exhibit
Stipulation of Facts
2
exhibitsticker.com

:kg 65 100

THE STATE OF SOUTH CAROLINA,

COUNTY OF BEAUFORT.

QUIT-CLAIM DEED

TO ALL WHOM THESE PRESENTS MAY COME:

FILED IN REAL EST BOOK 435 PAGE 329
FILED AT 09:35:00 ON 11/20/85

WHEREAS: SEA PINES PLANTATION COMPANY, SENDS GREETING:

NOW, KNOW ALL MEN BY THESE PRESENTS, That the said SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY, as Grantor, in consideration of the premises and also in consideration of the sum of TEN AND NO/100 DOLLARS ($10.00) to it in hand paid at and before the sealing and delivery of these presents by SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., Post Office Box 5861, Hilton Head Island, South Carolina, as Grantee (the receipt whereof is hereby acknowledged), has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the said SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., its successors and assigns forever, the following described "Common Properties", to-wit:

> All right, title and interest in and to the "Common Properties" of Braddock Cove described as all boat channels, waterways, channel markers, salt marsh open space areas, and all of Grantor's right, title and interest, if any, in the navigable waterways of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.
>
> Braddock Cove is generally shown and described on the General Land Use Map of Sea Pines Plantation, said map dated January, 1985, showing and depicting Braddock Cove as follows, to wit:
>
> Commencing at the southernmost intersection of Braddock Cove and Calibogue Sound, thence in an southerly direction along the shores of Land's End;
> Thence continuing in a southeasterly direction along the shores of Braddock Cove Club;
> Thence continuing in a southerly direction along the shores of South Beach Marina;
> Thence continuing in a southwesterly direction along the shores of Port Villas;
> Thence continuing in a northeasterly direction along the shores abutting Lots 9 and 21 of Wren Drive, Sea Pines Plantation;
> Thence continuing in a generally northwesterly direction along the shores of Lots 21, 22, 23, 24 of Gull Point Subdivision, the Gull Point Club Site, Lots 27, 28, and 29 of Gull Point Subdivision, Sea Pines Plantation;
> Thence continuing in a generally northwesterly direction to the northernmost intersection of Braddock Cove and Calibogue Sound adjacent to the general point of beginning.

TOGETHER with all and singular the rights, members, hereditaments and appurtenance to the said premises belonging or in anywise incident or appertaining:

WHEREAS, this Deed was recorded on 10-22-85 in Book 433 at Page 65; and
WHEREAS, the Grantee was incorrectly given as South Beach Owners Association, Inc., and
WHEREAS, the correct name is Sea Pines South Beach Owners Association, Inc.; and
WHEREAS, this Deed has been corrected to reflect the correct name of the Association; and
WHEREAS, this Deed is being re-recorded to correct the records;
NOW, THEREFORE...

FILED IN DEED BOOK 433 PAGE 65
FILED AT 09:41:00 ON 10/22/85

BEAUFORT COUNTY TAX MAP REFERENCE

Dist	Map	Submap	Parcel	Block
550	17		1203	

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TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said SEA PINES/SOUTH BEACH OWNERS ASSOCIATION, INC., its successors and assigns, forever--so that neither the said SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY, nor its successors, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof, forever.

WITNESS the hand and seal this 15th day of July, in the year of our Lord one thousand nine hundred and eighty-five and in the two hundred and tenth year of the Sovereignty and Independence of the United States of America.

Signed, Sealed and Delivered in the presence of

Barrier C Cave

Terry L Wynn

SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY,

By: _____

Attest: _____

THE STATE OF SOUTH CAROLINA,)
)
COUNTY OF BEAUFORT.)

PROBATE

PERSONALLY appeared before me, the undersigned witness, who on oath says that s/he saw the within named SEA PINES PLANTATION COMPANY, in and for itself, and as successor in interest to LIGHTHOUSE BEACH COMPANY, sign, seal and as its corporate act and deed, deliver the within written Deed; and that s/he, with the other witness whose signature appears above, witnessed the execution thereof.

Barrier C Cave

SWORN to before me, this 15th day of July, A.D. 1985.

Terry L Wynn

Notary Public for South Carolina
My Commission Expires: 10/28/92

FILED IN REAL EST BOOK 435 PAGE 530
FILED AT 03:38:00 ON 11/20/85

FILED IN DEED BOOK 433 PAGE 55
FILED AT 094100 ON 10/22/85 87353
BOOK NUMBER 433 PAGES 55- 56
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

RECORDED THIS 29th DAY OF October 1985 IN BOOK R PAGE 125
FEES $
Mary Ann Graves
AUDITOR BEAUFORT COUNTY, S C

ELECTRONICALLY FILED - 2024 Apr 15 2:43 PM - BEAUFORT - COMMON PLEAS - CASE#2021CP0701655
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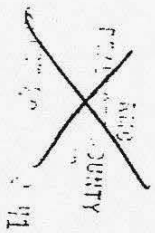

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OF November 19 85
IN BOOK R PAGE 179
FEES, $
Mary Ann Gray ISB
AUDITOR, BEAUFORT COUNTY, S. C.

Dowling's
FILED IN REAL EST BOOK 435 PAGE 531
FILED AT 09:38:00 ON 11/20/85 90160
BOOK NUMBER 435 PAGES 529- 531
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

Exhibit
Stipulation of Facts
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Exhibit
Stroup Motion Summary Judgment
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J, S & P/J P S

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

MODIFICATION OF COVENANTS

THIS MODIFICATION OF COVENANTS, made this 18th day of October, 1985, by SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC. a South Carolina Non-Profit Corporation, with its principal place of business at Hilton Head Island, South Carolina, hereinafter referred to as the "Association".

W I T N E S S E T H :

WHEREAS, Lighthouse Beach Company, a South Carolina limited partnership, as the original owner and developer of the South Beach area of Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, did file certain Restrictive Covenants applicable to the Association in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 176 at Page 203, on August 18, 1970; and

WHEREAS, the Association, as successor in interest to Lighthouse Beach Company, voted at its annual meeting on August 3, 1985, by unanimous vote, to amend the Covenants of the Association as referenced above;

NOW, THEREFORE, the Association does herewith declare that the Covenants and Restrictions applicable to the Association are herewith republished and reaffirmed, except as modified herein.

The Declaration of Covenants and Restrictions for Sea Pines South Beach Owners Association, Inc., as recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 176 at Page 203, are herewith amended as follows, to-wit:

Article 1, Section 1, Paragraph (c) - "Common Properties" is herewith amended by broadening the definition of Common Properties to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina.

Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985, and recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, in Deed Book 433 at Page 65.

FILED IN DEED - C BOOK 433 PAGE 57
FILED AT 094100 ON 10/22/85

FILED IN DEED - C BOOK 435 PAGE 532
FILED AT 09:33:00 ON 11/20/85

WHEREAS, this Modification was recorded on 10-22-85 in Book 433 at Page 67; and
WHEREAS, the name of the Owners Association was incorrectly written; and
WHEREAS, the correct name is Sea Pines South Beach Owners Association, Inc.; and
WHEREAS, this Modification has been corrected to reflect the correct name; and
WHEREAS, this Modification is being re-recorded to correct the records;
NOW, THEREFORE...

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IN WITNESS WHEREOF, the Association has caused this instrument to be executed the day and year first above written, by its President and attested by its Secretary and the corporate seal affixed thereto, pursuant to the unanimous vote of the members of the Association, and with the full approval and consent of the Board of Directors of the Association.

WITNESSES:

SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC.

By: _____, President

Attest: _____, Secretary

Dowling

FILED IN DEED - C BOOK 435 PAGE 533
FILED AT 09:38:00 ON 11/20/85 50161
~~BOOK NUMBER 435 PAGES 532 533~~
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
P R O B A T E HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

PERSONALLY appeared before me, the ~~undersigned witness, and made oath~~ that s/he saw the within named SEA PINES SOUTH BEACH OWNERS ASSOCIATION, INC., by its President and Secretary, sign, seal and deliver the within written Instrument, and that s/he, with the other witness whose signature appears above, witnessed the execution thereof.

SWORN to before me this 18th day of October, 1985.

Notary Public for South Carolina
My Commission Expires:
JAMES P. SCHNEIDER, JR.
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires November 25, 1991

Dowling

FILED IN DEED - C BOOK 433 PAGE 68
FILED AT 094100 ON 10/22/85 37354
BOOK NUMBER 433 PAGES 67- 68
FILING FEE 4.00
STATE STAMPS .00
COUNTY STAMPS .00
TOTAL FEES 4.00
HENRY JACKSON
CLERK OF COURT BFT CNTY, SC

The R. L. Bryan Company, Columbia, S. C.

8496

The State of South Carolina | CERTIFICATE OF INCORPORATION

EXECUTIVE DEPARTMENT | BY THE SECRETARY OF STATE

Exhibit
Mot. Summary Judgment
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Exhibit
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WHEREAS, Dennie L. McCrary and Harold Depkin
of
Sea Pines Plantation, Hilton Head Island, South Carolina
Lawton Jordan, Jr., Milledge Road, Augusta Georgia

two or more of the officers or agents appointed to supervise or manage the affairs of

SOUTH BEACH HOMEOWNERS' ASSOCIATION, INC.

which has been duly and regularly organized, did on the 2nd day of October, A. D. 1969, file with the Secretary of State a written declaration setting forth:

That, at a meeting of the aforesaid organization held pursuant to the by-laws or regulations of the said organization, they were authorized and directed to apply for incorporation.

That, the said organization holds, or desires to hold, property in common for Religious, Educational, Social, Fraternal, Charitable or other eleemosynary purpose, or any two or more of said purposes, and is not organized for the purpose of profit or gain to the members, otherwise than is above stated, nor for the insurance of life, health, accident or property; and that three days' notice in the Beaufort Gazette, a newspaper published in the County of Beaufort, has been given that the aforesaid Declaration would be filed.

AND WHEREAS, *Said Declarants and Petitioners* further declared and affirmed:

FIRST: Their names and residences are as above given.

SECOND: The name of the proposed Corporation is SOUTH BEACH HOMEOWNERS' ASSOCIATION, INC.

THIRD: The place at which it proposes to have its headquarters or be located is Sea Pines Plantation, Hilton Head Island, S. C.

FOURTH: The purpose of the said proposed Corporation is improving, maintaining and operating the common properties of the association for the benefit of the health, welfare and recreation of the members of the association.

FIFTH: The names and residences of all Managers, Trustees, Directors or other officers are as follows:

Dennie L. McCrary	Sea Pines Plantation	Director
Harold Depkin	Sea Pines Plantation	Director

SIXTH: That they desire to be incorporated: in perpetuity

NOW, THEREFORE, I, O. FRANK THORNTON, Secretary of State, by virtue of the authority in me vested, by Chapter 12, Title 12, Code of 1962, and Acts amendatory thereto, do hereby declare the said organization to be a body politic and corporate, with all the rights, powers, privileges and immunities, and subject to all the limitations and liabilities, conferred by said Chapter 12, Title 12, Code of 1962, and Acts amendatory thereto.

GIVEN under my hand and the seal of the State, at Columbia, this 2nd day of October, in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 94th year of the Independence of the United States of America.

O. FRANK THORNTON,
Secretary of State.

The R. L. Bryan Company, Columbia, S. C.

8496

The State of South Carolina

EXECUTIVE DEPARTMENT

CERTIFICATE OF INCORPORATION
BY THE SECRETARY OF STATE

WHEREAS, Dennie L. McCrary and Harold Depkin
of
Sea Pines Plantation, Hilton Head Island, South Carolina

Lawton Jordan, Jr., Milledge Road, Augusta Georgia

two or more of the officers or agents appointed to supervise or manage the affairs of

SOUTH BEACH HOMEOWNERS' ASSOCIATION, INC.

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That, at a meeting of the aforesaid organization held pursuant to the by-laws or regulations of the said organization, they were authorized and directed to apply for incorporation.

That, the said organization holds, or desires to hold, property in common for Religious, Educational, Social, Fraternal, Charitable or other eleemosynary purpose, or any two or more of said purposes, and is not organized for the purpose of profit or gain to the members, otherwise than is above stated, nor for the insurance of life, health, accident or property; and that three days' notice in the Beaufort Gazette, a newspaper published in the County of Beaufort, has been given that the aforesaid Declaration would be filed.

AND WHEREAS, *Said Declarants and Petitioners* further declared and affirmed:

FIRST: Their names and residences are as above given.

SECOND: The name of the proposed Corporation is SOUTH BEACH HOMEOWNERS' ASSOCIATION, INC.

THIRD: The place at which it proposes to have its headquarters or be located is Sea Pines Plantation, Hilton Head Island, S. C.

FOURTH: The purpose of the said proposed Corporation is improving, maintaining and operating the common properties of the association for the benefit of the health, welfare and recreation of the members of the association.

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Dennie L. McCrary	Sea Pines Plantation	Director
Harold Depkin	Sea Pines Plantation	Director

SIXTH: That they desire to be incorporated: in perpetuity

NOW, THEREFORE, I, O. FRANK THORNTON, Secretary of State, by virtue of the authority in me vested, by Chapter 12, Title 12, Code of 1962, and Acts amendatory thereto, do hereby declare the said organization to be a body politic and corporate, with all the rights, powers, privileges and immunities, and subject to all the limitations and liabilities, conferred by said Chapter 12, Title 12, Code of 1962, and Acts amendatory thereto.

GIVEN under my hand and the seal of the State, at Columbia, this 2nd day of October, in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 94th year of the Independence of the United States of America.

O. FRANK THORNTON,
Secretary of State.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NUMBER 2014-CP-07- 1435

CATWALK, LLC; MOONDOG, LLC; LET, LLC: LOST PARROT LLC; VACATION INN, LLC; SBM, LLC; SOUTH BEACH SWIMMING POOL, INC.,	)	
Plaintiffs,	)	
vs.	)	COMPLAINT (A Non-Jury Matter)
SEA PINES SOUTH BEACH PROPERTY OWNERS' ASSOCIATION, INC.,	)	
Defendant.	)	

2014 JUN 17 AM 11:15
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Catwalk, LLC, Moondog, LLC, Vacation Inn, LLC, and South Beach Swimming Pool, Inc., complaining of the Sea Pines South Beach Property Owners' Association, Inc., alleges as follows:

BY WAY OF A FIRST CAUSE OF ACTION

1. Catwalk, LLC, is a Limited Liability Company, organized and existing under the laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

2. LET, LLC, is a Limited Liability Company, organized and existing under the laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

3. Lost Parrot, LLC, is a Limited Liability Company, organized and existing under the laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

4. Moondog, LLC, is a Limited Liability Company, organized and existing under the

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laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

5. SBM, LLC, is a Limited Liability Company, organized and existing under the laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

6. South Beach Swimming Pool, Inc., is a South Carolina corporation, organized and existing under the laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

7. Vacation Inn, LLC, is a Limited Liability Company, organized and existing under the laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

8. Sea Pines South Beach Owners' Association, Inc., is a South Carolina corporation, organized and existing under the laws of South Carolina, and which maintains its principal office and owns real property in Beaufort County, South Carolina.

9. The Plaintiffs' bring this action under the authority of S. C. Code Ann. § 15-53-10, *et seq.,* (Supp. 2013), for the purpose of seeking a declaratory judgment that a recorded Declaration of Covenants dated June 25, 1970, and recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 176 at Page 203 does not encumber the real property owned by the Plaintiffs.

10. Catwalk, LLC, owns real property in Beaufort County, South Carolina, that is known and described as follows:

> All those certain pieces, parcels or lots of land shown on a plat entitled "Plat of the South Beach Marina Tract, a Section of Sea Pines Plantation" prepared by Jerry L. Richardson, SCRLS #4784, dated February 21, 1980, and recorded

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in the Office of The Register of Deeds for Beaufort County, South Carolina, in Plat Book 29 at Page 14; and which are more specifically shown and designated "Common Areas" on that certain plat entitled "A Survey of South Beach Marina, a Section of Sea Pines Plantation", dated March 24, 1988, prepared by Jerry L. Richardson, SCRLS #4784, and recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Plat Book 35 at Page 128.

11. LET, LLC, owns real property in Beaufort County, South Carolina, that is known and described as follows:

All that certain piece, parcel or lot of land situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, and being more particularly described as follows: Unit A of the Lands End Tavern Horizontal Property Regime as more particularly described in that certain Master Deed of South Beach Marina Village, a Partnership, establishing the Lands End Tavern Horizontal Property Regime, dated March 22, 1988, in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 498 at Page 979, as amended by Amendment and Restatement recorded in Official Record Book 2990 at Page 1882, together with all rights and hereditaments appurtenant thereto as described and set forth in said Master Deed, including an undivided interest in the Common Elements as described in the Master Deed.

12. Lost Parrot, LLC, owns real property in Beaufort County, South Carolina, that is known and described as follows:

All that certain Unit 300 in the South Beach Marina Village Horizontal Property Regime, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, as shown on the plans and specifications described in the Master Deed for said Horizontal Property Regime recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 508 at Page 632.

13. Moondog, LLC, owns real property in Beaufort County, South Carolina, that is known and described as follows:

All that certain piece, parcel or lot of land known as Parcel III, South Beach Marina Village, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, as more specifically described by reference to that certain plat prepared by Surveying Consultants of Hilton Head, Inc., dated March 8, 1988, last revised November 21, 1988, and recorded in the Office of The

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Register of Deeds for Beaufort County, South Carolina, in Plat Book 37 at Page 107.

AND

All that certain piece, parcel or lot of land with improvements thereon, containing 1.279 acres, more or less, and being designated on a plat entitled "Plat of 1.279 Acres, South Beach Area of Sea Pines Plantation, Beaufort County, South Carolina", dated November 9, 1987, and prepared by Surveying Consultants of Hilton Head, Inc., by Terry G. Hatchell, SCRLS #11059, and recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Plat Book 35 at Page 69.

AND

All that certain piece, parcel or lot of land known as Parcel II, South Beach Marina Village, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, as more specifically described by reference to that certain plat prepared by Surveying Consultants of Hilton Head, Inc., dated March 8, 1988, last revised November 21, 1988, and recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Plat Book 37 at Page 107.

The parcel is also known as Parcel II, Lands End Tavern Horizontal Property Regime by virtue of the Amendment and Restatement of the Master Deed Establishing Lands End Tavern Horizontal Property Regime recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 2990 at Page 1882.

14. SBM, LLC, owns real property in Beaufort County, South Carolina, that is known and described as follows:

All those certain pieces, parcels or tracts of land situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, and being more particularly described as Unit B, Unit C and Unit D or the Lands End Tavern Horizontal Property Regime in Sea Pines Plantation, and being more particularly described in that certain Master Deed of South Beach Marina Village, a Partnership, establishing the Lands End Tavern Horizontal Property Regime, dated March 22, 1988, and recorded March 24, 1988, in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 498 at Page 979, as amended by Amendment and Restatement recorded in Official Record Book 2990 at Page 1882, together with all rights and hereditaments appurtenant thereto as described and set forth in said Master Deed, including an undivided interest in the Common

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Elements as described in the Master Deed.

Also, all that certain piece, parcel or tract of land situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, commonly known as BOAT RAMP at SOUTH BEACH MARINA VILLAGE as more particularly shown and described on that certain plat entitled "A Survey of South Beach Marina Village, A Section of Sea Pines Plantation" by Surveying Consultants of Hilton Head Inc., Terry G. Hatchell, SCRLS #11059, dated March 8, 1988, and recorded March 24, 1988, in the Office of The Register of Deeds for Beaufort County, South Carolina, in Plat Book 35 at Page 128.

15. South Beach Swimming Pool, Inc., owns real property in Beaufort County, South Carolina, that is known and described as follows:

All that certain piece, parcel or lot of land, situate, lying and being in The Town of Hilton Head Island, Beaufort County, South Carolina, containing 0.463 acres, more or less, and shown and described as "Pool Parcel" on a plat entitled "A Boundary Survey of 3.961 Acres, A Section of South Beach Area, Sea Pines Plantation" dated November 11, 1999, and revised June 8, 2000, prepared by Terry G. Hatchell, SCRLS No. 11059, and recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Plat Book 75 at Page 121.

16. Vacation Inn, LLC, owns real property in Beaufort County, South Carolina, that is known and described as follows:

All those certain Units 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113 and 114/115, in South Beach Marina Horizontal Property Regime, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, as shown on the Plans and Specifications described in the Master Deed for said Horizontal Property Regime recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 508 at Page 632.

AND

All that certain piece, parcel or lot of land known as Parcel 1, South Beach Marina Village, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, as more specifically described by reference to that certain plat prepared by Surveying Consultants of Hilton Head, Inc., dated March 8, 1988, last revised November 21, 1988, and recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Plat Book 37 at Page 107.

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This parcel is also known as Unit 1, Lands End Tavern Horizontal Property Regime by virtue of the Amendment and Restatement of the Master Deed Establishing the Lands End Tavern Horizontal Property Regime recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 2990 at Page 1882.

AND

All those certain Unit Quarters 201-A, 201-B, 201-C, 201-D, 202-A, 202-B, 202-C, 202-D, 203-A, 203-B, 203-C, 203-D. 204-A, 204-B, 204-C, 204-D, 205-A, 205-B, 205-C, 205-D, 206-A, 206-B, 206-C, 206-D, 207-A, 207-B, 207-C, 207-D, 208-A, 208-B, 208-C, 208-D, 209-A, 209-B, 209-C, 209-D, 210-A, 210-B, 210-C, 210-D, 211-A, 211-B, 211-C, 211-D, 212-A, 212-B, 212-C, 212-D, 213-A, 213-B, 213-C, 213-D, 214-A, 214-B, 214-C, 214-D, 215-A, 215-B, 215-C, 215-D, 216-A, 216-B, 216-C, 216-D, 217-A, 217-B, 217-C and 217-D, in South Beach Marina Village Horizontal Property Regime, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, which consists of undivided twenty-five (25%) per cent interest in each said Unit as shown on the Plans and Specifications described in the Master Deed for said Horizontal Property Regime recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 508 at Page 632.

17. The Sea Pines South Beach Owners' Association, Inc., is a property owners' association established by the Lighthouse Beach Company, A South Carolina Limited Partnership, under a recorded "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina, and Provisions for the Sea Pines South Beach Owners' Association, Inc. (hereinafter, the "Sea Pines South Beach Covenants)"

18. The Sea Pines South Beach Covenants were recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 176 at Page 203, on August 18, 1970.

19. On February 15, 1973, the Lighthouse Beach Company, A South Carolina Limited Partnership, recorded a "Declaration of Rights, Restrictions, Affirmative Obligations, Conditions, Etc., which Constitute Covenants Running with certain Commercial Lands of Lighthouse Beach Company (hereinafter, the "Commercial Covenants").

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20. The Commercial Covenants were recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 206 at Page 1143.

22. The Commercial Covenants apply to Commercial Property, which is described as follows in Article 2 of the Commercial Covenants:

> Whenever used herein, the term "Commercial Property" shall apply to property used or to be used for all retail commercial uses except "package stores" for the sale and take-out of alcoholic beverages and real estate sales offices which accept listings, and offer for sale, real property outside the Forest Beach area. Permissible retail commercial uses shall include, but not be limited to, retail shops, hotel, motel, motor hotel, or motor lodge sites or operation, and all other Class "B" multi-family residence areas such as condominiums or apartments.

23. The Commercial Covenants read as follows, in relevant part:

> It is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that the covenants and restrictions contained herein shall be the sole applicable covenants restricting Commercial Property conveyed by LIGHTHOUSE BEACH COMPANY to grantees of the Company subsequent to the date of the Declaration adopting these covenants and restrictions being made applicable to such conveyances by specific references in individual deeds, or by subsequent declaration to the extent that there is variation from and addition to covenants herein recorded; however, those properties conveyed by LIGHTHOUSE BEACH COMPANY prior to the effective date of this instrument are not governed by or otherwise restricted by the consolidated uniform provisions of this Declaration, but are so governed and restricted by any covenants and restrictions previously recorded as set forth above and to which specific reference was made in the particular and appropriate deed of conveyance.

24. The properties described in Paragraphs 10-16 above are "Commercial Property" as described in the Commercial Covenants.

25. The Sea Pines Plantation Company was the successor in interest to Lighthouse Beach Company.

26. By a deed dated September 30, 1967, Sea Pines Land Company, Inc., conveyed certain property, which includes the properties described in Paragraphs 10-16 above to the

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Sea Pines Plantation Company. The September 30, 1967, deed is recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 150 at Page 42.

26. On October 17, 1974, the Sea Pines Plantation Company, Inc., recorded a "Declaration of Covenants and Restrictions By Sea Pines Plantation Company, Inc." (hereinafter, the 1974 Covenants").

27. The 1974 Covenants are recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 224 at Page 1036.

28. Among other things, the 1974 Covenants state how commercial properties within Sea Pines contribute to the "Community Fund" as the same is defined in the 1974 Covenants.

29. By a deed dated January 3, 1984, the Sea Pines Plantation Company conveyed property, which includes the properties described in Paragraphs 10-16 above to "South Beach Marina Village, A Partnership." The January 3, 1984, deed is recorded in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 385 at Page 1224.

30. The January 3, 1984, deed specifically makes the property conveyed therein subject to the Commercial Covenants, and the 1974 Covenants. The January 3, 1984, deed also makes reference to the Sea Pines South Beach Covenants. However, since the express language of the Commercial Covenants states that the Commercial Covenants are the "sole applicable covenants restricting Commercial Property", the reference to the Sea Pines South Beach Covenants is insufficient to bind the property conveyed in the January 3, 1984.

31. At no time did the Sea Pines South Beach Owners' Association, Inc., or its predecessor in interest, claim that the property conveyed to the Sea Pines Plantation

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Company in the September 30, 1967, deed was subject to the Sea Pines South Beach Covenants.

32. At no time did the Sea Pines South Beach Owners' Association, Inc., or its predecessor in interest, claim that the property conveyed to South Beach Marina Village, A Partnership, in the January 3, 1984, deed was subject to the Sea Pines South Beach Covenants.

33. Beginning in July of 2013, the Sea Pines South Beach Owners' Association, Inc., asserted that the real property owned by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC; and, South Beach Swimming Pool, Inc., and which is described in Paragraphs 10, 11, 12, 13, 14, 15 and 16 above is encumbered by the Sea Pines South Beach Covenants.

34. Beginning in July of 2013, the Sea Pines South Beach Owners' Association also asserted that Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, are members of the Sea Pines South Beach Owners' Association, Inc., and are obligated to pay assessments imposed by the Sea Pines South Beach Owners' Association, Inc., under the authority of the Sea Pines South Beach Covenants.

35. Prior to July of 2013, and for a period of more than 40 years, the Sea Pines South Beach Owners' Association, Inc., never asserted that Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, or any of their predecessors in title were members of the Sea Pines South Beach Owners' Association, Inc.

32. Prior to July of 2013, and for a period of more than 40 years, the Sea Pines South Beach Owners' Association, Inc., never sought to collect any assessments imposed by the Sea Pines South Beach Owners' Association, Inc., from Catwalk, LLC; Moondog, LLC; LET,

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LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, or any of their predecessors in title.

36. It was not the intent of Lighthouse Beach Company, or the Sea Pines Plantation Company that the Commercial Properties now owned by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, would be subject to the Sea Pines South Beach Covenants, or that the owners of those properties would be members of the Sea Pines South Beach Property Owners' Association, Inc.

37. The Sea Pines South Beach Covenants do not encumber the properties owned by from Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, and which are described in Paragraphs 10-16 above.

BY WAY OF A SECOND CAUSE OF ACTION

38. Each and every allegation of Paragraphs 1 through 37 above is re-alleged, as if fully repeated herein.

39. To the extent that the Sea Pines South Beach Property Owners' Association, Inc., ever had any right to enforce the Sea Pines South Beach Covenants against the properties owned by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, arising from the recording of the Sea Pines South Beach Covenants, the existence of any such right is denied, it has waived the same through its inaction for a period of more than forty (40) years.

BY WAY OF A THIRD CAUSE OF ACTION

40. Each and every allegation of Paragraphs 1 through 39 above is re-alleged, as if fully repeated herein.

41. To the extent that the Sea Pines South Beach Property Owners' Association, Inc., ever

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had any right to enforce the Sea Pines South Beach Covenants against the properties owned by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, arising from the recording of the Sea Pines South Beach Covenants, the existence of any such right is denied, it has abandoned the same through its inaction for a period of more than forty (40) years.

BY WAY OF A FOURTH CAUSE OF ACTION

42. Each and every allegation of Paragraphs 1 through 41 above is re-alleged, as if fully repeated herein.

43. To the extent that the Sea Pines South Beach Property Owners' Association, Inc., ever had any right to enforce the Sea Pines South Beach Covenants against the properties owned by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, the existence of any such right is denied, it now estopped to enforce the same as a result of its inaction for a period of more than forty (40) years.

BY WAY OF A FIFTH CAUSE OF ACTION

44. Each and every allegation of Paragraphs 1 through 43 above is re-alleged, as if fully repeated herein.

45. Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, and their predecessors in title have owned and occupied the properties described in Paragraphs 10 through 16 above for a period of more than forty (40) years without complying with the Sea Pines South Beach Covenants.

46. Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, and their predecessors in title have owned and occupied the properties described in Paragraphs 10 through 16 above for a period of more than forty (40) years without paying

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any assessments authorized by the Sea Pines South Beach Covenants.

47. Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC and SBM, LLC, and their predecessors in title have owned and occupied the properties described in Paragraphs 10 through 16 above for a period of more than forty (40) years without participating in any way with the activities of the Sea Pines South Beach Property Owners' Association, Inc., or claiming to be a member thereof.

48. As described herein, the ownership of the properties described in Paragraphs 10 through 16 above by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC, and SBM, LLC, has been continuous, hostile, open, actual, notorious and exclusive against the interest in the property now claimed by Sea Pines South Beach Property Owners' Association, Inc., for a period of more than forty (40) years.

49. Any right that the Sea Pines South Beach Property Owners' Association, Inc., may have ever had any right to enforce the Sea Pines South Beach Covenants against the properties owned by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC; and SBM, LLC, is now barred by S. C. Code Ann. § 15-3-380 (Supp. 2013), as a result of its inaction, and the continuous, hostile, open, actual, notorious and exclusive possession of Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC; and SBM, LLC, for a period of more than forty (40) years.

CONCLUSION

Wherefore, Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC; SBM, LLC, pray that this Honorable Court inquire into the matters set forth herein, and that it render its Judgment, declaring that the real property Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC; SBM, LLC, and described in this

Complaint is not encumbered by the Sea Pines South Beach Covenants, that they are not members of the Sea Pines South Beach Property Owners' Association, Inc., and that they have no liability for assessments made or imposed by the Sea Pines South Beach Property Owners' Association, Inc., and for all other and further relief as this Honorable Court may deem just and proper.

COLTRANE & WILKINS, LLC

By: _____

Curtis L. Coltrane
South Carolina Bar Number 1344
Post Office Drawer 6808
Hilton Head Island, SC 29938
(843) 785-5551
(843) 785-5552 (Fax)
curtis@coltraneandwilkins.com

Hilton Head Island, South Carolina

This 16th day of June, 2014.

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STANLEY S. STROUP, AS TRUSTEE OF THE STANLEY S. STROUP REVOCABLE TRUST DATED NOVEMBER 10, 2023, ET AL. V. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION
CASE NO. 21021-CP-07-01655

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

EXHIBIT 1
MASTER-IN-EQUITY ORDER DATED JANUARY 22, 2016

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP0701435

PLAINTIFF(S)		DEFENDANT(S)
Catwalk Llc	**Moondog Llc**	**Sea Pines South Beach Property Owners Association Inc**
Let Llc	**Lost Parrot Llc**	
Vacation Inn Llc	**Sbm Llc**	
South Beach Swimming Pool Inc		

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THIS CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

Order On Plaintiffs' Motion And Defendant's Cross Motion For Summary Judgment

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/ M. H. Dukes, III	**3069**	1/22/2016
Master-In-Equity	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **January 22, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **January 25, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Curtis Lee Coltrane PO Box 6808 Hilton Head Island, SC 29938	**John Michael Jordan** PO Box 23526 Hilton Head Island, SC 29925-3
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	Melissa Kilby
Court Reporter	**Jerri Ann Roseneau - Clerk of Court**

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CATWALK, LLC, MOONDOG, LLC, LET, LLC, LOST PARROT, LLC, VACATION INN, LLC, SBM, LLC, AND SOUTH BEACH SWIMMING POOL, INC.,

Plaintiffs,

vs.

SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.,

Defendant.

Case No. 2014-CP-07-01435

ORDER ON PLAINTIFFS' MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

2016 JAN 22 PM 4:12
JEAN MARIE BEREAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

The dispositive question before the Court, raised by the parties in the Motion and Cross Motion for Summary Judgment, is whether Commercial Use Covenants recorded in 1973 exempt Plaintiffs' properties from the obligations of 1970 Covenants for South Beach, Sea Pines Plantation, Hilton Head Island, South Carolina. The Court finds Plaintiffs properties are encumbered by and subject to the 1970 Covenants and the 1973 Commercial Use Covenants. The Court grants Defendant's Cross Motion for Summary Judgment and denies Plaintiffs' Motion for Summary Judgment.

THE PARTIES:

Plaintiffs Catwalk, LLC, Moondog, LLC, LET, LLC, Lost Parrot, LLC, Vacation Inn, LLC, SBM, LLC, and South Beach Swimming Pool, Inc. (hereafter "Plaintiffs") are South Carolina corporations which own real property in South Beach, Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina. Defendant Sea Pines South Beach Owners Association, Inc. ("the Association") is a South Carolina corporation chartered in 1969 to

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maintain and administer the common properties in South Beach, enforce the covenants and restrictions governing real property in South Beach, and collect and disburse necessary assessments and charges.

PROCEDURAL HISTORY:

Plaintiffs filed their lawsuit on June17, 2014 seeking a declaration that their properties are not encumbered by the 1970 Covenants, that Plaintiffs are not members of the Association, and that Plaintiffs have no liability for assessments made or imposed by the Association. Defendant answered and counterclaimed alleging Plaintiffs' properties are encumbered by the 1970 Covenants and Plaintiffs are members of the Association subject to the rights and obligations of South Beach property owners. Plaintiffs subsequently filed a Motion for Reference pursuant to Rule 53(b), SCRCP. On February 18, 2014 an Order was entered referring this matter to the Master in Equity.

Plaintiffs filed their Motion for Summary Judgment on June 15, 2015. Defendant filed its Combined Response to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment on August 7, 2015. The Court received and reviewed the parties' briefs and supporting affidavits, examined relevant covenants filed of record in Beaufort County. heard oral arguments on August 19, 2015, and received and reviewed letter briefs following oral arguments.

STANDARD OF REVIEW:

Plaintiffs and Defendant filed Motions for Summary Judgment. A party seeking summary judgment in its favor must show there is no genuine issue of material fact. Rule 56(c), SCRCP. As stated in *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607,610, 230 S.E. 2nd 447,448 (1976), this requires "plain, palpable and indisputable facts… on which reasonable minds cannot differ." If the non-moving party presents evidentiary facts from which the Court

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may conclude or infer that a dispute exists, the motion must be denied. See, e.g. *Mikell v. County of Charleston*, 375 S.C. 552, 654 S.E. 2nd 92 (S.C. App. 2007). Such facts may be shown by the answer, discovery, and affidavits. See Rule 56(c), SCRCP.

As the non-moving parties in the others' motions, Plaintiffs and Defendant are entitled to have facts viewed in the light most favorable to each.

UNDISPUTED FACTS:

In this matter relevant facts are not in dispute. These are:

1. South Beach is a 102.63 acre planned unit development community in Sea Pines Plantation, Hilton Head Island, South Carolina.
2. Two covenants are at issue: (1) the *Covenants and Restrictions for South Beach and Provisions for the South Beach Owners' Association, Inc.* dated June 25, 1970 recorded by Lighthouse Beach Company in Book 176 at Page 203 in the Office of the Register of Deeds for Beaufort County, as amended from time to time ("the 1970 Covenants') and (2) the *Commercial Use Covenants* dated January 25, 1973 recorded by Lighthouse Beach Company in Book 206 at Page 1143 in the aforesaid Office (the 1973 Commercial Covenants').
3. The real property subject to the 1970 Covenants is that 102.63 acre parcel or property described in Exhibit A to the 1970 Covenants as the parcel of land shown as South Beach on a Plat Recorded in the Office of the Clerk of Court for Beaufort County in Plat Book 18 at Page 126.
4. Plaintiffs' properties are within the 102.63 acre South Beach parcel.
5. The Commercial Use Covenants recorded in 1973 apply to all property owned by Lighthouse Beach Company on Hilton Head Island designated for commercial use.

This includes commercial property in the South Beach parcel.

6. Plaintiffs' properties are subject to the 1973 Commercial Covenants.
7. Plaintiffs' titles, with the exception of Plaintiff South Beach Swimming Pool, Inc., trace back to a Deed between the Sea Pines Plantation Company and South Beach Marina Village, a Partnership, dated January 3, 1984 and recorded in Deed Book 385 at Page 1224. Between 1984 and 2008 Plaintiffs or their predecessors acquired title to properties originally conveyed in the January 3, 1984 deed
8. The January 3, 1984 deed states that the properties are conveyed subject to the 1970 Covenants recorded in Book 176 at Page 203 and the 1973 Commercial Covenants recorded in Book 206 at Page 1143.
9. The title to the property now owned by Plaintiff South Beach Swimming Pool, Inc. arose from a 1987 Deed of the Trustee of the Hilton Head Liquidation Company. The Trustee conveyed this property as part of the plan of reorganization of Sea Pines Plantation and other properties approved by the United States Bankruptcy Court.
10. The property now owned by South Beach Swimming Pool, Inc. was also conveyed subject to the 1970 Covenants and 1973 Commercial Covenants. Deed Book 1198 at Page 450.
11. The 1970 Covenants contain a non-waiver provision: "...failure by the Association or any Owner or the Company to enforce any covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce same thereafter."

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PARTIES ARGUMENTS:

Plaintiffs' Argument for Summary Judgment

Plaintiffs argue their properties are subject to the 1973 Commercial Covenants, but not the 1970 Covenants. As such, they contend they are not members of the Association and not subject to Annual Assessments and Special Assessments by the Association. Plaintiffs point to one sentence in the 1973 Commercial Covenants as the basis of their argument. That sentence, from the recitations of the 1973 Commercial Covenants, states:

> It being the true intent and purpose of this declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by Lighthouse Beach Company, subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by reference to individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of Lighthouse Beach Company, that to the extent that there is a conflict between these restrictions and covenants previously recorded, as set forth above, and those of the instant declaration, the provisions of the instant Declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.

Plaintiffs argue that a portion of the above statement, that these are the "sole applicable covenants", means their properties are not subject to the 1970 Covenants, also recorded by Lighthouse Beach Company.

Defendant's Response:

Defendant raises three legal responses to Plaintiffs' argument:

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(1) The 1973 Commercial Covenants state, in the sentence before the quotation above: "The Company reserves in each instance the right to add, in Deeds of Conveyance, additional covenants in respect to said properties so conveyed by such Deed…." Plaintiffs' acquired their property starting in 1984, and in each instance the 1970 Covenants and 1973 Commercial Covenants were added to the Deeds of Conveyance, precisely as permitted by the quoted language.

(2) The sentence Plaintiffs rely upon expressly recognizes that commercial property may be subject to additional covenants by stating that a conflict between the 1973 Commercial Covenants and other covenants may exist.

(3) The 1973 Commercial Use Covenants address design, aesthetic, and environmental considerations and are intended to be the applicable covenants and restrictions for those issues only.

Defendant's Argument for Summary Judgment

Defendant argues it is entitled to summary judgment:

(1) There is no dispute that Plaintiffs' properties are within the parcel encumbered by the 1970 Covenants;

(2) Plaintiffs' title documents state the properties are encumbered by the 1970 Covenants and the 1973 Commercial Covenants; and

(3) The language of the 1973 Commercial Covenants shows that they overlay, not supplant, the 1970 Covenants.

LEGAL ANALYSIS AND CONCLUSIONS

It is well-settled law that restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent as determined from the

entire document. *Taylor v. Lindsey*, 332 S.C. 1, 498 S.E. 2nd 862 (1998): *RV Resort and Yacht Club Owners Ass'n* v. *BillyBob's* 386 S.C. 313, 688 S.E.2nd 555 (2010). Wording will be given its common and ordinary meaning. *Taylor*, id. Restrictive covenants differ from contracts in that they run with the land, meaning they are enforceable by and against later grantees. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,* 368 S. C. 342, 628 S. E. 2nd 902 (Ct. App. 2006).

Neither Plaintiffs nor Defendant argue that the covenants are voidable, unenforceable, or ambiguous. "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E. 2nd 256, 259 (2013). See also *Hanold v. Watson's Orchard Prop. Owners Ass'n, Inc.* 412 S.C. 387, 772 S.E. 2nd 528 (Ct. App. 2015) *reh'g denied* June 19, 2015). "The court is required to give effect to the plain meaning of the words in an unambiguous contract." *Schulmeyer v. State Farm Fire & Cas. Co.* 353 S.C. 491, 497, 579 S.E. 2nd 132, 135 (2003

The 1970 Covenants recorded by Lighthouse Beach Company create a planned unit development community known as South Beach. They provide for the creation of the Association and grant the Association the authority to maintain and administer common properties, enforce covenants, and collect and disburse necessary assessments and charges. The 1970 Covenants encumber all real property within the 102.63 acre South Beach parcel. Plaintiffs' properties lie within that parcel. The 1970 Covenants state that each owner of real property within the South Beach parcel shall be a member of the Defendant Association.

The 1973 Commercial Covenants state: "Lighthouse Beach Company recognizes that said properties are situate in an environmentally sensitive area and that any development of said

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property is a matter of concern to both the developing party and the Community-at-large" and memorialize a desire by Lighthouse Beach Company to develop its property, wherever situated, "…pursuant to an orderly plan which contemplates the environmental impact on the Community-at-Large." The 1973 Covenants provide that Lighthouse Beach Company may add additional covenants to Deeds of Conveyance and recognize that commercial property may be subject to other covenants and restrictions.

By its plain meaning, the 1970 Covenants create a planned unit development community and give authority to the Association to maintain and administer the community. The 1973 Commercial Covenants set forth design, environmental and other standards and requirements to assure that commercial property is in keeping with stated environmental and aesthetic goals.

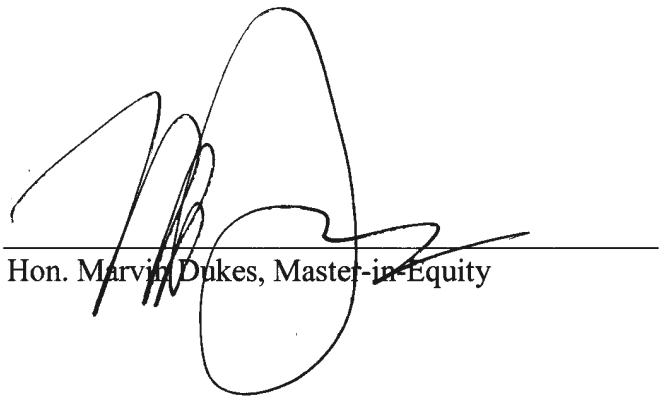
To the extent a property in South Beach is commercial in nature, the 1973 Commercial Covenants complement rather than conflict with other community restrictions. The Court finds that as a matter of law Plaintiffs' properties are subject to and encumbered by the 1970 Covenants and the 1973 Commercial Covenants. Accordingly, Plaintiffs are members of the Association, with all rights and obligations of membership.

Plaintiffs' Motion for Summary Judgment seeks a ruling that the Association is barred by S. C. Code Ann. §15-3-380. Section 380 is the limitations period for an action for possession of real property. An action for possession is brought pursuant to S. C. Code Ann. §15-67-10. No such action or claim was plead by Defendant. That issue is denied.

Plaintiffs' also seek summary judgment claiming waiver, abandonment, or estoppel. The 1970 Covenants contain an unambiguous non-waiver provision. Moreover, Plaintiffs made no showing of prejudice or reliance, nor that the Association intended to relinquish a known right. See, e.g. *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2nd 465 (2007). That issue is also denied.

The Court DENIES Plaintiffs' Motion for Summary Judgment.

The Court GRANTS Defendant's Cross Motion for Summary Judgment. Final Judgment is hereby entered in favor of Defendant on all Counts in Plaintiffs' Complaint. Final judgment is also entered in favor of Defendant on its Counterclaim by the Court's finding that Plaintiffs' properties are subject to and encumbered by the 1970 Covenants and the 1973 Commercial Covenants, and Plaintiffs are members of Defendant Association.



Hon. Marvin Dukes, Master-in-Equity

January 12, 2016
Beaufort, South Carolina

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Hilton Head Island, SC 29938
(843) 785-2171

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Exhibit
Stipulation of Facts
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DECLARATION OF COVENANTS AND RESTRICTIONS BY COMMUNITY SERVICES ASSOCIATES, INC.

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STATE OF SOUTH CAROLINA	)	**DECLARATION OF COVENANTS AND**
	)	**RESTRICTIONS BY COMMUNITY**
COUNTY OF BEAUFORT	)	**SERVICES ASSOCIATES, INC.**

WHEREAS, Community Services Associates, Inc., ("CSA") is a South Carolina Not-For-Profit Corporation and is the owner of that certain real property located within Sea Pines Plantation, Hilton Head Island, Beaufort County, South Carolina, shown and described on the attached Exhibit "1" (hereinafter the "Subject Property"); and

WHEREAS, CSA was established to own and maintain certain real properties within Sea Pines Plantation as a representative organization of property owners within Sea Pines Plantation and in accordance with its stated purposes has acquired title to the Subject Property; and

WHEREAS, the Subject Property is subject to various restrictive covenants to include that certain "Declaration of Covenants and Restrictions by Sea Pines Plantation Company" which is recorded as Exhibit "B" to that certain Deed recorded in the Office of the RMC for Beaufort County, South Carolina, in Deed Book 254 at Page 1924; and

WHEREAS, CSA, as the owner, desires to impose on the Subject Property further restrictive covenants as contained hereinafter.

NOW, THEREFORE, this Declaration of Covenants and Restrictions encumbering the Subject Property is made the 19th day of DECEMBER, 1997, by CSA.

1. **WHEREAS CLAUSES.** That the above "Whereas" clauses are incorporated herein by their reference thereto, as fully as if restated herein.
2. **PROHIBITION OF PERMANENT DOCKS, ETC.** That no permanent dock, pier, wharf, weir, floating dock, or other similar structure may be constructed on the Subject Property, nor may any such structure emanate therefrom. The Subject Property shall not be used for access to any permanent dock, pier, wharf, weir, floating dock, or other similar structure.
3. **PROHIBITION OF MUSICAL FESTIVALS, ETC.** That no portion of the Subject Property may be used for music festivals, outdoor music concerts, or other similar events or gatherings in which musical entertainment is an inducement for attendance.

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This language shall not be construed so as to prohibit music played at a reasonable level at an event otherwise permissible pursuant to these covenants.

4. **PROHIBITION OF DRIVING RANGE AND PAR 3 GOLF COURSE, ETC.** That no portion of the Subject Property may be used for the purpose of a golf driving range or for a Par 3 golf course, executive golf course or any other abbreviated golfing venues.

5. **PROHIBITION OF SWIMMING POOL.** That no swimming pool shall be placed upon or used on the Subject Property.

6. **PERMITTED STRUCTURES.** Structures in the nature of beach bath house facilities, sports equipment storage, outdoor cookout facilities for non-commercial use, non-profit pavilions and structures for sanitary and safety purposes, which includes by way of example and not as a limitation, fencing and parking areas, which are used to support the above, shall be permitted. Temporary structures may be placed upon the Subject Property provided all plans, to include location of the Subject Property and specification of time or removal and return to previous condition, have been approved, in writing, by CSA.

7. **LIMITATION ON ENTRY, USE AND MAINTENANCE FEES.** Entry fees, use fees and maintenance fees may be charged for the use of facilities on the Subject Property, provided that such fees shall not include any profits and not exceed an amount reasonably necessary to cover all operating expense, taxes, interest on funds borrowed for improvements, and amortization of the cost of improvements.

8. **ACCESS LIMITATION.** The use of Subject Property and the facilities shall be limited to Participating Property Owners in Sea Pines Plantation (as that term is defined in those certain Covenants recorded in Deed Book 224 at Page 1036) and their guests in accordance with Rules and Regulations adopted by CSA.

9. **ESTABLISHMENT OF RULES AND REGULATIONS.** CSA, by and through its Board of Directors, may establish such rules and regulations regarding the use of the Subject Property as it shall deem necessary and prudent. The rules and regulations so established may provide for the levying and collecting of fines for violation(s) thereof.

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10. **OPTION TO PURCHASE.** In the event that the Board of Directors of CSA shall vote to sell the property then CSA shall grant to the Sea Pines South Beach Owners Association, Inc., a South Carolina not-for-profit corporation (hereinafter SPSBOA), established pursuant to the restrictive covenants files in the Office of the RMC for Beaufort County, South Carolina, in Deed Book 176 at Page 203 on August 18, 1974 and subsequent amendments thereto, subject to the limitation contained hereinafter, an option to purchase the Subject Property.

10.1 Within five days of the time that the Board of Directors of CSA passes a resolution to sell the Subject Property, CSA shall by certified mail submit to SPSBOA notice of the terms of the sale. SPSBOA shall within 120 days of the mailing receipt notify CSA of its intentions. If it notifies CSA that it does not wish to exercise the option or it if does not indicate its desire, within 120 days, then CSA shall be free to proceed with any sale. Should SPSBOA notify CSA within the 120 days by certified mail that it is going to exercise its option, then such notices shall specify a closing date within 150 days of the date of CSA's mailing the notice to the SPSBOA by certified mail. At the time SPSBOA notifies CSA of its intention to exercise its option hereunder, it shall include an earnest money deposit equal to ten (10%) percent of the purchase price. CSA shall place the earnest money into an interest bearing account with the interest to accrue to CSA's benefit.

10.2 The purchase price to be paid by Sea Pines South Beach Owners Association, Inc., its successors and assigns, shall be the lesser of 1) the sum equal to the purchase price paid by CSA to acquire the Subject Property from its predecessor in title, adjusted on an annual basis by the same percentage used by CSA annually to adjust the amount of assessments paid by Participating Property Owners, together with all realty property taxes (if any), attributable to the Subject Property, paid by CSA or 2) the amount of any bono fide offer made to CSA and which the CSA Board has agreed to accept, subject to this option. The purchase price shall be paid to CSA at closing by way of a certified or cashier's check. All closing costs shall be prorated between or paid by the parties in accordance with the custom in Beaufort County.

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10.3 Should the CSA Board vote to lease the property for a period of time longer than fourteen (14) days then prior to entering into any such lease CSA shall offer to the Sea Pines South Beach Owners Association, Inc. a lease on the same terms and conditions to that voted upon by the CSA Board. The Sea Pines South Beach Owners Association shall have thirty (30) days to exercise this rental option. Notice shall be given in the same manner and forms as is set forth in Paragraph 10.1 above.

10.4 In the event that Sea Pines South Beach Owners Association, Inc. does not exercise the option granted hereunder in strict accordance with the procedure set forth in Paragraph 10.1 hereof, CSA shall be entitled to file of public record a notice stating the date of the certified mailing and that no notice of exercise of the option granted hereunder has been received and that such option is terminated. Such notice shall be conclusive proof of termination of the option granted hereunder.

10.5 That said conveyance pursuant to the terms and conditions of this Option to Purchase shall be subject to and contingent upon the retention by CSA of a right of reversion wherein fee simple title to the property, free and clear of all encumbrances subsequent to transfer by CSA to SPSBOA, other than purchase money mortgages, shall revert to Community Services Associates, Inc., its successors and assigns, upon the occurrence of any of the following events: 1) the dissolution, termination of existence, lapse of corporate charter, or administrative dissolution of SPSBOA; or 2) the insolvency, business failure, appointment of a receiver for any property, real or personal, of assignment for the benefit of creditors by, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against, SPSBOA; or 3) the sale or transfer of the property to any person or entity other than an entity which is a property owners association for the South Beach area of Sea pines Plantation or a wholly owned subsidiary of SPSBOA, and which association and transfer have been approved by CSA, its successors and assigns.

11. **PRIOR COVENANTS.** This property continues to be encumbered by all prior covenants, and specifically by the 1974 Covenants as recorded in that certain deed in the Office of the RMC for Beaufort County, South Carolina, in Deed Book 224 at Page 1036.

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12. **VIOLATIONS OF COVENANTS.** In the event of a violation of these covenants, CSA or any member of CSA shall be entitled to bring an action to enforce same. In the event such an action is brought, the prevailing party, as determined by the trier of fact, shall be entitled to be paid its attorney's fees and costs of litigation by the non-prevailing party. The trier of fact may award partial attorney fees or his discretion, based upon the degree of success obtained by the prevailing party.

13. **AMENDMENTS.** The Declarant expressly reserves the right to impose additional and further restrictive covenants upon the Subject Property, either by amendment hereof or by separate documents encumbering the Subject Property, by a majority vote of the Board of Directors of CSA, its successors and assigns. Such Amendment shall be effective when executed by its duly authorized officers after approval by a majority of the Board of Directors and upon recordation in the Office of the RMC for Beaufort County, South Carolina.

14. **DURATION.** The covenants and restrictions of this Declaration shall run with and bind the Subject Property, and shall inure to the benefit of and be enforceable by CSA, its legal representatives, successors and assigns for a period of Twenty-five (25) years from the date this Declaration is recorded in the public record. Upon the expiration of such Twenty-five (25) year period, this Declaration shall be automatically renewed and extended for successive ten (10) year periods. The number of renewals and extensions shall be unlimited unless this Declaration is terminated pursuant to a majority vote of the Board of Directors of CSA, its successors and assigns, and by a majority vote of the Participating Property Owners pursuant to a Referendum, as such terms are defined in those certain restrictive covenants recorded in the Office of the RMC for Beaufort County, South Carolina, in Deed Book 224 at Page 1036. The termination shall be effective upon the later of the successful passage of the referendum or the majority vote of the Board of Directors of CSA. In the vent that the Board of Directors of CSA passes a resolution to terminate these covenants as set forth herein and the Participating Property Owners vote to terminate these covenants as provided for herein, then in such an event Community Services Associates, Inc. grants to the Sea Pines South Beach Owners Association, Inc. an option to purchase which said option may only be

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exercised in the manner and in strict accordance with the terms set forth in Paragraph 10 (including all sub-paragraphs) above.

15. **GENERAL PROVISIONS.**

15,1 Should any covenant or restriction herein contained, or any paragraph, sentence, clause, phrase, or term within this Declaration be declared to be void, invalid, illegal or unenforceable for any reason by the adjudication of the highest court or other tribunal which considers such matters and has jurisdiction over the parties hereto and the subject matter hereof, such judgment shall in no way affect the other provisions hereof which are hereby declared to be severable.

15.2 In all cases, the provisions of this Declaration shall be given that reasonable interpretation or construction which shall best effect consummation of the general plan of land use restrictions and affirmative obligations of Sea Pines Plantation, which will carry out the intent of CSA as expressed in the recitals of these Covenants, and which will preserve the Subject Property as portion of an attractive well-maintained, privately-governed residential community.

15.3 Failure to enforce any provisions of this Declaration shall not operate as a waiver of any such provision or of any other provisions of this Declaration.

15.4 When necessary for proper construction, the masculine form of any word used in this Declaration shall include the feminine or neuter gender, and the singular, the plural and vice versa, and words used in the present tense shall include the future tense.

15.5 The captions and headings in this instrument are for convenience only and shall not be considered in construing any provisions of this Declaration.

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WHEREFORE, Community Services Associates, Inc. has, by and through its duly elected officers, executed this Declaration on the day and date first above written.

WITNESSES:

Sh L. Ivey

Peggy Lobeor

COMMUNITY SERVICES ASSOCIATES, INC.

By: John Fraser III
PRESIDENT

ATTEST: Mark A. Kirby
EXECUTIVE VICE PRESIDENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

PROBATE

PERSONALLY appeared before me the undersigned, and made oath that s/he saw within named **COMMUNITY SERVICES ASSOCIATES, INC.**, by its duly authorized officers, sign and affix its seal as its act and deed, deliver the within written Agreement and s/he with the other subscribing witness witnessed the execution thereof.

SWORN TO BEFORE ME
this 19th day of December, 1997

Sh L. Ivey

Suzanne Sherman
Notary Public for South Carolina
My Commission expires: July 13, 2000

24dacvaux\CSA Parcel I Covenants 11.20.97

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EXHIBIT 1
SUBJECT PROPERTY

ALL those certain pieces, parcels or tracts of land situate, lying and being at South Beach in Sea Pines Plantation, on Hilton Head Island, in Beaufort County, South Carolina, containing 1.79 Acres, shown and designated as Recreational and Club Area "B," 3.23 Acres, shown and designated as Recreational and Club Area "A," and 0.63 Acres, more or less, as shown and described on a Plat entitled "A Plat of Lands End Subdivision Phases I, II, III, IV," dated March 27, 1978 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina in **Plat Book 27 at Page 197**.

Reference is made to the aforementioned plats of record for a more detailed description of the Subject Property.

ASPPPO
Association of Sea Pines Plantation Property Owners, Inc.
and
CSA
Community Services Associates, Inc.

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COMMUNITY SERVICES ASSOCIATES, INC. (CSA)
ASSOCIATION OF SEA PINES PLANTATION
PROPERTY OWNERS, INC. (ASPPPO)
Board of Directors Joint Resolution

WHEREAS, the Sea Pines Waterways Task Force (the Task Force) issued its Final Report (the Report) on August 19, 2011which stated:

"1. The Task Force analyzed all methods for dredging Harbour Town Marina, Braddock Creek, including South Beach Marina, private docks at Gull Point, Portside and Port Villas, and Baynard Creek (collectively referred to herein as the Sea Pines Waterways).
2. During this time the Task Force consulted independent engineers, government officials including regulators, dredging contractors and others. The Task Force also reviewed numerous publications and regulations concerning dredging operations and procedures.
3. The Task Force reviewed the various dredging methods including mechanical and hydraulic. The Task Force learned that hydraulic dredging is preferred by regulators and would be the least expensive and most effective method for the Sea Pines Waterways.
4. The Task Force reviewed methods for disposal of the dredge material including disposal at a land based disposal site, off shore at a federally approved dredge material disposal site, use of dewatering techniques using polymers or geotextile tubes, and open water disposal. The Task Force confirmed that open water disposal is specifically authorized in state dredging regulations and has been used by the Army Corps of Engineers in South Carolina waterways.
5. The process for obtaining a permit for open water disposal involves complying with a joint protocol of the Army Corps of Engineers (the Corps) and the U.S. Environmental Protection Agency (the EPA) and complying with a S.C. Department of Health Environmental Control protocol. Certain Task Force members have had meetings with these regulators and the Chief of the Regulatory Division of the Charleston District of the Corps has offered to coordinate a task force to pursue compliance with the various protocols.
6. The Task Force considered the impact of these various dredge and disposal methods on the Sea Pines Community and surrounding environment. The Task Force concluded that hydraulic dredging with open water disposal would have the least adverse impacts on our community and the surrounding environment.
7. The Task Force carefully considered cost information on the various dredging and disposal methods. The Task Force learned that hydraulically dredging the Sea Pines Waterways with open water disposal would be by far the least expensive of all the methods considered.
8. The Task Force considered the adverse effects of not dredging the Sea Pines Waterways including the effects on the Heritage Golf Tournament, tourism in general and more specifically at Harbour Town and the South Beach Village, gate fees and on the values of our homes throughout Sea Pines. The Task Force concluded that there would be significant adverse effects if dredging were not conducted as soon as possible.
9. The Task Force considered the opinions of our residents through the 2009 residents' survey, which revealed overwhelming support for maintaining the navigability of the Sea Pines Waterways, and through various open meetings in our community lead by CSA and ASPPPO. The consensus from those meetings was enthusiastic support for dredging the Sea Pines Waterways hydraulically with open water disposal." ; and

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WHEREAS, the Report concluded:

> "Having considered the environmental, economic, social, legal and technological suitability of hydraulic dredging with open water disposal for the Sea Pines Waterways, the Task Force concludes that they are the only feasible methods for dredging the Sea Pines Waterways and that there are no feasible alternatives."

Now THEREFORE, be it resolved this 23rd day of November 2011 that the CSA and ASPPPO Boards of Directors, considering the Task Force findings with respect to the environmental, economic, social, legal and technological suitability, hereby:

1. Endorse the needed dredging of Sea Pines Waterways using hydraulic dredging with open water disposal;

2. Offer active support and encouragement for efforts which will facilitate such dredging;

3. Urge South Island Dredging Association to pursue permitting for hydraulic dredging with open water disposal and as soon as possible, develop and implement a plan, including necessary funding, to obtain permits for hydraulic dredging and open water disposal in accordance with procedures recommended by the consulting engineers;

4. Urge South Island Dredging Association to work with Sea Pines leadership in leading a coordinated effort to gain the acceptance of and support for open water disposal for Sea Pines dredging operations, by government officials, regulators and environmental interest groups ; and

5. Encourage the Sea Pines Community to support hydraulic dredging with open water disposal in order to maintain navigable Sea Pines Waterways.

Community Services Associates, Inc.

By _____
John McLauchlin, President

Association of Sea Pines Plantation Property Owners

By _____
Michael Hellman, President

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, *each both individually and derivatively*, Plaintiffs, v. SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE # 2021-CP-07-01655 **PLAINTIFFS' OPPOSITION TO DEFENDANT'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT OR RECONSIDER**

Plaintiffs respectfully oppose Defendant Sea Pines South Beach Owners' Association's ("Association") motion to reconsider. This Court is correct in its ruling dated July 22, 2024.

I. Introduction

The Association's motion makes the same arguments it made at trial. These arguments were fully addressed in the extensive briefs filed and arguments made at trial and were found by this Court to be without merit.

In its motion, the Association repackages its arguments and states that this Court misapplied applicable principles of contract interpretation, repeats its view that the South Carolina Nonprofit Corporation Act authorizes the Association to collect dredging assessments, and says once more that certain affirmative defenses

pled by the Association preclude granting declarative and injunctive relief to Plaintiffs in this case.

This memorandum focuses on the specific points the Association makes in its motion.

II. Argument

A. Contract Interpretation.

1. Purpose of the Association

The contract interpretation argument in the Association's motion is based on a misstatement of the Association's authorized purpose. The Association states that its primary purpose is to "protect and preserve property values" in South Beach.[1] The only support the Association cites for this assertion is language in the second and third recitals of the Declaration. Recitals are not legally binding contractual terms,[2] but in this case the recitals that mention the preservation of "values and amenities" specifically recognize that the Association's only "power and authority" in providing "for the preservation of the values and amenities" is by "maintaining and administering" the "Common Properties."[3]

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[1] Mot. at p. 5.

[2] "A 'whereas' clause of a contract is . . . not an essential part of the operating portions of the contract." *Black's Law Dictionary* p. 1596 (6th ed. 1991).

[3] Ex. 1 at p. 1.

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The recitals state,

> WHEREAS, Company has deemed it desirable, for the efficient preservation of the values and amenities in said community, to create an agency to which should be delegated and assigned the power and authority of maintaining and administering the Common Properties and administering and enforcing the covenants and restrictions governing the same and collecting and disbursing all assessments and charges necessary for such maintenance, administration and enforcement . . . . [4]

The "agency" referred to in the recital is the Association and the authority given to this "agency" by the Declaration is limited to administering the "Common Properties." The Declaration's recitals unambiguously confirm that the Association's authority is limited to managing "Common Properties" and that the express terms of this authority are as set forth in the terms of the Declaration that follow the recitals. The Association has no other purpose. The recitals do *not* authorize the Association to amend the Declaration to collect assessments for *any* purpose that its board believes *might* enhance the value of *some* property in South Beach.

The recitals list types of properties that the developer *expected* would become "Common Properties" such as "parks, playgrounds, open spaces, lakes, boat docks, boat channels, fishing docks, swimming pools, roadways, bike trails, common parks within townhouse areas, and other Common Properties . . . ."[5] But as a consequence of the developer's bankruptcy in the 1980s,[6] none of these

[4] Ex. 1 at p. 1 (emphasis added).

[5] Ex. 1 at p. 1.

[6] *See* Ex. 36.

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properties was deeded to the Association and therefore none of them became "Common Properties." The parties have stipulated that the Association has never owned real property.[7]

As in its previous briefs and at trial, the Association again points out that the list in the recitals includes the words "boat channels" and "likened" them "to Common Properties for which the Association had the duty to maintain and protect."[8] Apparently, the Association concludes that including boat channels on a list of *possible* Common Properties in the recitals authorizes the Association to designate boat channels belonging to others (and any other items on the list) to be "Common Properties" and to assess members to pay for their upkeep without complying with the substantive requirements for creating "Common Properties" imposed by the Declaration. The Association's position was, and still is, untenable and contrary to the express terms of the contract.

The Association's motion incorrectly states, "there is no rule that says the definition of 'Common Properties' must be limited to deeded property."[9] However, that is exactly the rule stated in the Declaration:

> "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties."[10]

And there are several rules that support this Court's conclusion that the 1985

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[7] Jt. Stip. of Facts ¶ 18.

[8] Mot. at p. 9.

[9] Mot. at p. 11.

[10] Ex. 1, art. I(d) (emphasis added).

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Modification did not change the "deeded to the Association" requirement. Among them are,

1. The rule stated in *Queen's Grant II v. Greenwood Development Corp.*[11] that amendments to restrictive covenants must strictly comply with the amendment terms of the governing declaration;[12]

2. The rule stated in *Queens Grant II* that amendments that are unreasonable, indefinite, or against public policy are ineffective;[13]

3. The rule stated in the Declaration that amendments do not become effective unless the conditions precedent stated in Article II, Section 1 are satisfied;[14]

4. The rule stated in Article II, Section 2(b) of the Declaration that property may be added to the jurisdiction of the Association only by a Supplementary Declaration filed by the owner of the added property;[15]

5. The rule stated in Article II, Section 2(b) that a Supplementary Declaration may only add terms "as are not inconsistent with the Plan of this Declaration."[16]

6. The rule stated in Article VII, Section 1 of the Declaration that only "the covenants" may be amended;[17] and

7. The rule that "the paramount rule of [contract] construction is to

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[11] 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).

[12] *Plaintiffs' Trial Brief*, filed Apr. 23, 2024, at pp. 19–20 ("Pl. Tr. Br.").

[13] Pl. Tr. Br. at pp. 25–36.

[14] Pl. Tr. Br. at pp. 4, 9, 20–25.

[15] Pl. Tr. Br. at pp. 3, 7, 11–13.

[16] Pl. Tr. Br. at pp. 15, 25–29.

[17] Pl. Tr. Br. at pp. 13–16.

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ascertain and give effect to the intent of the parties as determined from the whole document."[18]

Each of these points was briefed extensively and argued at length at trial. The Court ruled correctly, and the Association's motion to change that correct ruling should be denied.

B. Other contract interpretation arguments

The Association makes three additional arguments based on South Carolina contract law to support its contention that the 1985 Modification authorized dredging assessments.

First, the Association tries to dismiss as irrelevant procedural niceties both (a) mandatory contractual conditions precedent in the Declaration for effectiveness of amendments, and (b) legal requirements imposed by *Queens Grant II* and related cases.[19] But conditions precedent imposed by contract[20] and by law[21] are substantive requirements and this Court correctly held that they must be satisfied before amendments become effective.

Second, the Association asserts that this Court's order is overly broad because it "prevents the Association from levying any annual assessments

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[18] *Palmetto Dunes Resort, Div. of Greenwood Development Corp. v. Brown*, 336 S.E.2d 15, 18, 287 S.C. 1 (S.C. App. 1985)

[19] Mot. p. 15.

[20] Ex. 1, art. VII, sec. 1 (mandatory amendment requirements).

[21] *Queen's Grant II*, 628 S.E.2d at 920 (discussing the "rule of strict construction governing restrictive covenants . . . .").

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necessary for its operation and continuing existence."[22] But the Association is bound by the limitations imposed by its own governing documents and the law. Its purpose is not assuring its own continued existence, but "maintaining and operating the common properties"[23] As this Court found after reviewing a voluminous record, the Association has no common properties to manage and, without common properties to manage, it has no authority to collect assessments. All the contract law interpretation principles quoted by the Association in its motion support this Court's interpretation of the Association's governing documents.[24]

Further, the Court's order will not leave the Association "entirely unable to conduct necessary business," as the Association claims.[25] First, without common properties to manage, the Association has no "necessary business" that it is authorized to conduct. Second, without authority to levy assessments, the Association still may solicit voluntary contributions to cover the nominal cost of maintaining its corporate existence and continuing to hold its supposed right of first refusal. As the Association's financial documents show, it has no expenses other than administrative costs for self-perpetuation.[26] The property subject to the Association's right of first refusal is open space that has been owned and operated

[22] Mot. at p. 12.

[23] Ex. 4 at p. 1.

[24] Mot. at p. 13.

[25] Mot. at p. 13.

[26] Ex. 34.

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by the Community Services Association for the use and enjoyment of all Sea Pines residents for many years without financial support from the Association.[27] And another entity (Sea Pines Plantation Company) actually has the right of first refusal on the property, so the Association's interest is actually a second-in-line right of refusal for a property that likely never will be conveyed a first time.[28]

Third, the Association states that the amendment to the definition of "Common Properties" in the 1985 Modification was authorized because "everything contained therein [the Declaration] is considered a 'Covenant' and thus subject to amendment . . . ." [29] However, the Declaration clearly distinguishes between "covenants" and the other terms of the Declaration. As discussed in the previous briefing,[30] amendments to terms of the Declaration other than "the covenants" are not authorized. This Court's order was correct.

2. South Carolina non-profit corporation law

In its motion, the Association states "[t]his Court's order does not reference Section 33-31-302 of the South Carolina Code, which broadly enumerates, without limitation, various of the powers held by non-profit

[27] Ex 31.

[28] *See, e.g.,* Ex. 31 at p. 2 ("the Subject Property is subject to various restrictive covenants to include that certain 'Declaration of Covenants and Restrictions by Sea Pines Plantation Company' . . . .").

[29] Mot. at p. 11.

[30] Pl. Tr. Br. at pp. 13–17.

corporations, like the Association," and argues that this provision shows that "[t]hese Covenants and Modification are clearly lawful."[31]

This argument is a red herring. Irrespective of a nonprofit corporation's power to enter into lawful contracts, all corporations are bound by the terms of the contracts they actually make. Here, the contract between Plaintiffs and the Association does not authorize the Association to collect assessments except to manage "Common Properties." The Association has no "Common Properties" — it owns no real property at all.[32] The power of a corporation to enter into lawful contracts has no bearing on the interpretation of the contracts at issue in this case.

Further, a nonprofit corporation's authority to exercise statutory corporate powers may be limited by its certificate of incorporation.[33] Here, the Association's certificate of incorporation limits its authority to "improving, maintaining and operating the common properties of the association . . . ."[34] Again, there are no "common properties of the association." Consequently, its assessment levies are *ultra vires*. For further discussion of the *ultra vires* issue, *see* Plaintiffs' Trial Brief pp. 43–44.

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[31] Mot. at p. 10.

[32] Jt. Stip. of Facts ¶ 18.

[33] *See, e.g.*, S.C. Code §§ 33-31-206(b); 33-31-301; 33-31-302.

[34] Ex. 4 at p. 1.

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3. Affirmative defenses

The Association's motion reargues its affirmative defenses. The merit of these defenses was fully briefed and argued by the parties at trial and this Court found them to be without merit. They are discussed briefly below.

A. Standing and statute of limitations

The Association argues that Plaintiffs have no standing to obtain relief because they acquired their property in South Beach after the 1985 Modification was filed and therefore "each Plaintiff took their property with full notice of the Covenants to which they were to be bound—of course, that is the purpose of covenants."[35]

The issue in this case is not whether the parties had notice of the Declaration's terms. The issue in this case is: What do the terms of the Declaration mean? Subject to possible future lawfully adopted amendments, the terms of the Association's governing documents as now recorded apply to future assessments that may be levied by the Association. The Association's supposed levy of past assessments under the mistaken notion that they were authorized does not change the meaning of the Declaration that is in effect today. A challenge to recover *past* assessments arguably may be subject to the statute of limitations, but as long as Plaintiffs own property in South Beach they have standing to question the

[35] Mot. at p. 15.

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authority of the Association to levy and collect *future* assessments under the Association's governing documents as they exist today.

If the Association's theory of standing and statutes of limitation were correct, no one who currently owns property in South Beach would be able to contest the authorization for any future assessment levied by the Association. Statutes of limitation begin to run when actions are taken under documents, not when the documents were signed.[36] This Court held correctly that Plaintiffs have standing and that their action for prospective declaratory and injunctive relief is not time barred.

B. Laches, equitable estoppel, and waiver

The Association asserts that Plaintiffs' supposed delay in bringing this case bars them from relief under the doctrines of laches, equitable estoppel, and waiver. The Declaration itself provides that delay does not estop or waive a party's right to enforce the Declaration. Article VII, Section 3, states,

> Failure by the Association or any Owner or the Company to enforce any covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce same thereafter.[37]

Indisputably, non-waiver provisions are enforceable.[38]

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[36] *Cf. Poly-Med, Inc. v. Novus Scientific Pte. Ltd.*, 437 S.C. 343, 354, 878 S.E.2d 896, 902 (S.C. 2022) ("We acknowledge the obvious—an executory contract with continuing rights and obligations may result in separate breaches and give rise to separate causes of action for breach of contract subject to a new statute of limitations period.").

[37] Ex. 1 at p. 14, art. VII, sec. 3.

[38] *Cf. Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (S.C. 1998) (stating that non-waiver clause was effective).

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But irrespective of the effect of the non-waiver term in the Declaration, the doctrines of laches, equitable estoppel, and waiver do not apply to the facts in this case. Waiver requires *proof* of the *intentional* relinquishment of a known right.[39] Here, there is no evidence that Plaintiffs intended to relinquish their right to question the Association's right to levy future assessments.

Laches and equitable estoppel are equitable defenses that are available to a party that detrimentally changes its position based on unreasonable conduct of the other party and without knowledge of the underlying facts. Here, the Association claims that it detrimentally relied on Plaintiffs' delay in bringing this action because Plaintiffs' delay supposedly induced the Association to continue to collect assessments under the mistaken belief that they were authorized. Plaintiffs submit that the Association has no legally recognized reliance interest that would allow it to continue collecting unauthorized assessments [40] Moreover, Defendant's arguments do not apply to the claims for prospective relief.[41]

Further, equitable defenses such as laches and equitable estoppel that require a showing of detrimental reliance are not available in cases involving the

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[39] "Waiver is the voluntary and intentional relinquishment of a known right. . . . Waiver, like estoppel, is an affirmative defense and the burden of proof is upon the party who asserts it." *Provident Life and Acc. Ins. Co. v. Driver*, 451 S.E.2d 924, 317 S.C. 471 (S.C. App. 1994) (internal citations omitted).

[40] *Cf.* Ex. 12 at p. 8 ("Moreover, Plaintiffs made no showing of prejudice or reliance, nor that the Association intended to relinquish a known right. *See, e.g. Strickland v. Strickland*, 375 S.C. 76,650 S.E.2nd 465 (2007). That issue is also denied.")

[41] *See, e.g., Queen's Grant*, 628 S.E.2d at 902, 368 S.C. at 342 (finding developer had not shown that the defenses of laches and estoppel applied to claims against it for prospective relief).

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interpretation of an unambiguous contract. As the court stated in *Rodarte v. Univ. of S.C.*,[42]

> Indeed, an unambiguous, written contract is inherently incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable estoppel, a party must prove "lack of knowledge, and the means of knowledge, of the truth as to the facts in question." . . . However, an unambiguous contract is by definition capable of only one reasonable interpretation.

Detrimental reliance requires that the party asserting it had no knowledge of the true facts. As interpreted by this Court, the Association's governing documents are unambiguous and do not authorize the Association to collect assessments until it owns Common Properties. The Association is charged as a matter of law with knowledge of the meaning and the legal effect of its own governing documents.

C. Ratification

Ratification is an agency law doctrine that allows a principal with authority to act to approve the act of an agent who did not have authority.[43] Here, there is no principal-agent relationship between the Association and its members. The member vote approving the 1985 Modification was the act of the Association itself, not the act of an agent who needed the blessing of the principal. For the reasons stated in *Plaintiffs' Opposition to Defendants' Trial Brief*[44] and as determined by this

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[42] 799 S.E.2d 912, 419 S.C. 592 (S.C. 2017) (internal citations omitted)

[43] *Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E. 2d 801, 803 (1989) ("[r]atification . . . means the express or implied adoption and confirmation by one person of any act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.") (emphasis added).

[44] *Plaintiffs' Opposition to Defendants' Trial Brief*, filed April 29, 2024, at pp. 21–23 ("Pl. Opp. Br.").

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Court, the vote did not authorize dredging assessments under the Association's governing documents and applicable South Carolina law. No vote by those without the necessary power—be it one vote or hundreds of votes—can create authority where none existed in the first place. The Association cannot ratify one action by taking a different action pursuant to a purported amendment that was itself unauthorized.

D. Collateral estoppel and *res judicata*

The doctrines of collateral estoppel and *res judicata* prevent parties from re-litigating specific matters decided in a previous case. The Association asserts that Plaintiffs in this case are barred from relief because the claims they make here were decided against them in *Catwalk*. They were not. The defenses of collateral estoppel and *res judicata* require proof of the following elements:

1. The parties against whom the defenses are asserted must have been parties to the previous case.[45]

Indisputably, Plaintiffs Stroup and Trager were not parties in *Catwalk*.

2. The previous case must have decided the same issue (collateral estoppel) or the same claim (*res judicata*) that is involved in the current case.

Catwalk decided a single substantive issue and a single substantive claim: that the terms of another contract, a 1970 declaration of covenants applicable to commercial properties in South Beach, did not exempt the *Catwalk* plaintiffs from the Declaration at issue in this case.[46] This case does not involve the document at

[45] *Ex parte Allstate Ins. Co.*, 339 S.C. 202, 206–207, 528 S.E.2d 679 (Ct. App. 2000).

[46] Ex. 27, *Catwalk* order.

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issue in *Catwalk.* This case involves the interpretation of the Declaration and the 1985 Modification. *Catwalk* did not consider or determine whether the Association owns any "Common Properties" and did not consider or determine whether the Association has authority to collect dredging assessments.

The collateral estoppel and *res judicata* issues are discussed fully in *Plaintiffs' Opposition to Defendants' Trial Brief*, pp. 23–31, which is incorporated herein.

III. Conclusion

All parties here agree that the Braddock Cove waterways belong to the State of South Carolina.[47] Those public waterways are not "Common Properties" of this private property owners' association.

In addition, the 1985 Modification purporting to add the Braddock Cove waterways to the Declaration's definition of "Common Properties" did not become effective (a) because it was not adopted in compliance with the Declaration's amendment requirements and (b) because it is unreasonable, indefinite, and against public policy. And even if it became effective, it did not change the Declaration's requirement that "Common Properties" must be properties deeded by the owner (the State of South Carolina) to the Association—which never was done. Today, those waterways still belong to the State of South Carolina and can be used by any member of the public.

This Court's order correctly applies the law to the facts of the case. The Association's Motion to Reconsider should be denied.

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[47] Jt. Stip. of Facts ¶ 26.

ROA 0406

Respectfully submitted,

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October 30, 2024

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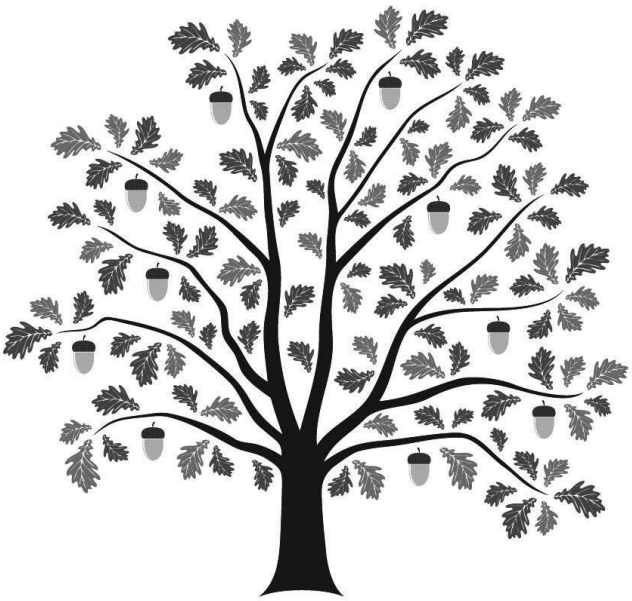
May 3, 2024

Stanley S. Stroup, et al. v. Sea Pines South Beach Owners' Association, Inc.



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STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO. 2021-CP-07-01655
STANLEY S. STROUP, et al.,	)	
	)	
Plaintiffs/Counterclaim Defendants,	)	
	)	
vs.	)	
	)	
SEA PINES SOUTH BEACH OWNERS' ASSOCIATION, INC.,	)	
	)	
Defendant/Counterclaim Plaintiffs.	)	

* * * * * * * * * * * * * * * *

HEARING BEFORE: JUDGE ROBERT J. BONDS

DATE TAKEN: Friday, May 3, 2024

TIME: 1:57 p.m.

PLACE: Colleton County Courthouse
101 Hampton Street
Walterboro, South Carolina

REPORTED BY: EVE WILBANKS
Registered Professional Reporter, Certified LiveNote Reporter and Notary Public

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ROA 0411

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THE COURT: All right. We're here on 2021-CP-07-01655, Stroup and others versus Sea Pines South Beach Owners' Association. And so Mr. Ford, Mr. Tillman -- or Ms. Tillman. I'm sorry.

MS. TILLMAN: That's quite all right.

THE COURT: And, Mr. Elliott?

MR. ELLIOTT: Yes, your Honor.

THE COURT: Great. So who wants to tell me what is going on? I have read the briefs. I want you to know that.

MR. FORD: Your Honor, I'm Ian Ford. I'm for the plaintiff. And I think my friend Mr. Elliott and I agreed I'll do my thing. With your Honor's permission, I'll give my presentation and he'll give his, and we'll all go home for the weekend, if that's okay.

MR. ELLIOTT: I want to make sure you're good with the screen here?

THE COURT: It's a little bit unusual.

MR. FORD: It's odd.

THE COURT: As long as you're good, I'm fine.

MR. FORD: And I do have copies of the slides in case you all want to peruse them at

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your leisure. There's nothing secret about them.

May I approach, your Honor?

THE COURT: Yes, sir.

MR. ELLIOTT: I may at times end up looking over here if that's --

THE COURT: Whatever you all want to do.

MR. FORD: May it please the Court, my name is Ian Ford. I'm here on behalf of the plaintiffs, Mr. Stroup, Mr. Trager and Vacation Inn, LLC. Mr. Stroup and Vacation Inn are present in the courtroom.

And as an initial matter, we have submitted extensive briefs. We'd like, for the record, to incorporate them into our presentation by reference. I mercifully won't go through all of the points; I know they're long. But just for the record --

THE COURT: Let me ask, you're referring to -- when you say your trial brief, Plaintiffs' Pretrial Brief, and it was filed on the 23rd of April and it's about 45 pages long; is that your document?

MR. FORD: That is and our opposition brief, filed on 4/29/2024. And we've jointly

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submitted a stipulation of facts and Exhibits, and I think we both incorporated that into the record. Rather than putting on all of that evidence, we just agreed on it.

THE COURT: All right. That's fine.

MR. FORD: May it please the Court, this is an unusual case about an unusual property owners' association, the POA. My clients are members of the POA, and the POA is the defendant.

This POA owns no property; that's not disputed. It owns no real property, has never owned real property. Even so, it wants to assess its members, including my clients, to maintain and pay for property that others own. And that's the gist of what this case is about. My clients don't think that they can assess the members to maintain property that the POA doesn't own and has never owned.

And what is that? This is about Braddock Cove. And your Honor may be familiar with this area. Braddock Cove is a pretty large body of water that's shown on slide 2 here, just for people following along.

And this POA is -- abuts part of it but

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not all of it. Braddock Cove runs in from the main waterway. It touches other areas; it touches this association. It doesn't touch all of the association. But that's what we're talking about here.

THE COURT: So where is Harbour Town in relation to that?

MR. FORD: Um, it's close by. I think it's down here, your Honor. So you go down, and it's in this area.

THE COURT: I only say that because that's about the only place I go, once a year for a golf tournament on a Friday, and so I saw the picture, and so I was just trying to get a feel for --

MR. FORD: We have an Exhibit, Exhibit 20, that has --

THE COURT: It's no big deal.

MR. FORD: We've got all the Exhibits in a notebook if anyone wants them.

MR. ELLIOTT: Not to interrupt, for informational purposes, these waterways are all pretty close to Harbour Town. It's not far off.

THE COURT: All right.

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MR. FORD: And please jump in any time. Of course, you're the boss. So what this is about is dredging. And here on slide 3, basically, every now and then, Braddock Cove needs to be dredged. And there is a separate organization that does that. It is called South Island Dredging Association, SIDA. They manage it, they get the permits and they have voluntary members, one of which is this a POA.

Regardless of whether or not this POA participates, it gets dredged in various degrees. And the members of SIDA vary from time to time, but -- as to how much they contribute and so on. So from time to time SIDA manages the dredging of this, and sometimes this POA contributes to that.

There is no dispute about some things. I'm going to set some predicate facts. Braddock Cove is owned by South Carolina, the state; it's a public waterway. Everyone agrees on that. That's in the Constitution; we've stipulated to it. It's not in dispute.

Another thing that is not in dispute is the converse of that, which is that this POA does not own Braddock Cove, to state the

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obvious. It is the public waterways of South Carolina.

So what we're talking about dredging is not anything that belongs to the POA, and that is not disputed.

In addition, as I mentioned, but it's worth emphasizing, this is in our stipulation, paragraph 18, the association has never owned any property. It's never paid property taxes, owned no real property since its founding. And there's a historical reason for that. It's an oddity, but it's -- what happened was, way back in the day, early 1970s, late 1960s -- it's really a sub-association. It was set up, the developer planned to donate, put some common property into it.

It never happened; the developer went bankrupt, life went on. So essentially, since then, this POA has just existed to exist.

And your Honor is probably familiar with POAs. Common property of POAs is something they hold in trust. They hold the deed and they maintain it. Their purpose is to maintain it; it's something they own, and that the members have a right through their deed

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too; that is what the typical common property is.

For example, a park, a roadway, a clubhouse, that is a standard common property. This is nothing like that. And again, it's not disputed that the POA does not own Braddock Cove. Essentially, what this POA has done, lo these many years is, it sends out bills to its members. It collects money. It buys insurance. It pays someone to send out more bills, collects money, buys insurance; sometimes it buys office supplies. That's essentially what it's done for lo these many years. Because it never had a reason to exist, it never actually got common property.

So it's also important, this predicate, that sometimes Braddock Cove is dredged by SIDA, the organization. And this association does not participate. That's true for the 2022-2023 dredge. And here is -- from Exhibit 35, in this one, the board decided -- no vote of the members; the board just decided: We're not going to participate in this dredge.

So Braddock Cove is dredged sometimes by SIDA, sometimes the POA pays, sometimes it

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doesn't. Dredging occurs regardless.

So why are we here? This is the key issue we believe for trial. Under these governing documents -- this contract that is the governing documents for this association, can this POA legally assess its members to dredge property it doesn't own?

THE COURT: Well, let me ask you about that.

MR. FORD: Yeah.

THE COURT: Couldn't they, if they were set up in that way, or are you saying they're not set up that way?

MR. FORD: I'm saying they're not set up that way.

THE COURT: Nothing prohibits them legally if they wanted to set it up correctly, using air quotes there -- if they wanted to set it up correctly, there's nothing legally that would prohibit them from setting out, if they got the proper permits, and participating in dredging this property? Is that -- because that's what I want to make sure. First of all, you said they can't assess property you don't own? And I guess my point is, you're

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not saying -- are you saying that they can't assess it as in no one can, or this POA can't do it under the way they're set up?

MR. FORD: The second one.

THE COURT: Okay. Fine. Thank you.

MR. FORD: And I'm going to go through those points. That's exactly the right point. There are two documents. It's a matter of contract; it's a matter of property law. That's what I'm about to go through. I'm not looking for a universal ruling on all POAs.

THE COURT: I'm just trying to make sure as I look at this -- because you all know more about it than I do -- that's not an issue, so I can move completely away from that?

MR. FORD: So we believe and the documents support that the answer to this core question is the POA --

James, I'm on slide 10, just so you know.

The POA only has authority to assess members to maintain common properties that it owns. And the public waterways are not a common property. And I'm going to go through the three parts of their documents that we

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think establish that.

There are two primary contract documents at issue -- really one contract and one modification. The governing documents in 1970, the covenants -- this is the Constitution of this community. And I think it's Exhibit 1. And there's another document that was reported to be changed in 1985, and I'll get to that.

But I'm going to talk you through the three points: What is common property? How does something become common property? And can the POA assess for anything other than common property?

And those are, in our view, the three main points that this document, the Constitution, establishes.

So here is the definition of common property. It's Exhibit 1. It's subpart C, Common Properties, slide 12. "Common properties" -- I'm going to read it for the record. "Common properties shall mean and refer to those areas of land with any improvements thereon which are deeded to the association and designated in said deed as

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common properties."

It goes on, "All common properties are to be devoted to and intended for the common use and enjoyment of owners of the properties, subject to the fee schedules and operating rules adopted by the association."

And this makes sense. Essentially, the POA has to -- for something to be a common property of the POA, they have to own it. It has to have been deeded to them through a specified process. And it has to belong to the members. And that probably makes sense; that's what common properties often are.

THE COURT: That common property, that definition you just read off I found in page 2 in your memo, that is the definition of common properties when the document was initially written --

MR. FORD: 1970.

THE COURT: -- out of its origin?

MR. FORD: Correct. So how does something become common property? Because that will become an issue here. And your Honor can probably expect, you know, the association cannot make anything it so wishes

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common property. It doesn't have a wand where it can designate a school common property -- a public school or this courthouse. It can't wave its wand and make this courthouse its common property. There's a specified procedure. And that is on slide 13, Other Additions.

And what's important here is the overview as well as the specifics. For something to be the common property, it has to be brought into the plan for the community. That's the first line here. It has to be within the plan of these covenants additional lands. It can't be something on the outside; it's got to be something that is subject to the jurisdiction and rule of this association.

And this is how it happens, section B. "Other additions: Upon approval in writing of the association, pursuant to three-fourths of the vote of the duly-called meeting, the owner of any property, other than the company, who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the association, may file of record a supplementary declaration with

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respect to the additional property which shall extend the operation and effects of these covenants to it."

So there are some elements there. The owner of this new property has to deed it to the association; there has to be a vote and so on. It's not a unilateral decision by one party. The owner has to deed it. And then it has to become subject to the jurisdiction of the association. And still -- hopefully this still makes sense because, for something to be common property of the POA, they have to be able to control it, and it's held in trust for the members.

So we've said what common properties are, how they're added. This is critical. Assessments can only be used to maintain common properties. This is the third sort of leg of this logical chain. It's section 2. The purpose of assessments -- any assessments of the association, levied but shall be used exclusively for the improvement, maintenance and operation of the common properties. And it goes on.

So they can only assess their members to

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maintain the common properties that the association owned, that had been deeded to them properly by the owner of the organization.

So, in a nutshell, that is the structure of our case. The association may not assess its members to maintain property it doesn't own. Braddock Cove is not a common property because it's undisputedly a public waterway. And therefore, we think their assessments are improper if they seek to assess us, my clients, in the future.

So your Honor may be wondering, Okay, Mr. Ford, why so much paper then if it's that simple? And the reason so much paper, so many Exhibits, so much back and forth is essentially the excuses. The association apparently really, really wants to dredge Braddock Cove or contribute at times, in its pleasure, to assess -- and so they have come up with a lot of reasons why they should.

And the first is the second key document here. And that's, in 1985, they purported to add Braddock Cove to their common -- definition of common property. That's Exhibit

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3. And based on that -- we have it up, but based on that, what they purported to do was to add common properties -- the boat channels, waterways, channel markers and salt marsh and open spaces of Braddock Cove to the definition of common property. They just did it.

THE COURT: And your client was aware of that when he purchased the property, correct?

MR. FORD: This was of record.

THE COURT: Right. So he had the ability to know this was the case when he bought the property in '85? There's no reason, if he wanted to conduct due diligence, that he couldn't have found that?

MR. FORD: This was of record in Court, in the Register of Deeds, when they bought it.

THE COURT: So the answer to my question is yes?

MR. FORD: Yes. And there's no dispute that the association doesn't own anything in the 1985 covenant. This is a stipulation, paragraph 26 and 27, which essentially says, The stuff in the 1985 covenant, the association does not own.

Our argument, your Honor, is the 1985

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covenant is invalid for many, many reasons. One is that -- what I said, the waterways belong to South Carolina. They've never been deeded to the association, as required by the covenants. They can't just unilaterally take something as common property.

And therefore, they're not common property. For example, they don't hold title to it, the public waterways. They don't have the right to keep people on and off. They can't control it. They can't do all the things that the covenants require them to be able to do for common property: Mortgage it, assess fees, exclude other people. It's just not valid under the covenants.

So -- and I think this gets to maybe what your Honor was asking about. Well, if they did it in '85, we're in 2024, why are we talking about it now? And that's their way for an estoppel argument. They're like, We did it in 1985. Why are you complaining now?

And there's a lot of clear answers. One, there is an anti-waiver provision in the covenants. It says it right here: Failure by any owner to enforce any covenant or

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restriction herein for any period of time shall not be deemed a waiver or estoppel of the right to enforce.

So another example is they had dredged in the past, but -- and that's the waiver/estoppel argument. They contributed to dredging; they didn't dredge it themselves. Sometimes they contributed, sometimes they didn't.

And they can't -- the argument is basically: Well, we did it wrong before so it's okay now. But you can't take a wrong act under the governing documents, one, two, a hundred, a thousand times and it suddenly becomes right. It's still wrong, and you can't amend the documents improperly by misinterpreting them.

Importantly, my clients are only looking for future relief. They're not looking to go back to past assessments and get that back. They're not. They want a declaratory judgment that going forward from here, they can't -- the POA cannot continue to misinterpret this and assess members going forward for dredging properties that the POA indisputably does not

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own.

Another example may be useful. Say someone moved in today and bought property and they brought this lawsuit and they said, Well, I don't think this is the right interpretation of this document. They certainly wouldn't be waiver/estopped because they bought it today.

And they have the same rights as everyone does. So they wouldn't be able to get money back. But going forward, they could bring this case. They wouldn't be waived or estopped. And so too with all the other members. You can't look at when someone bought. Did they buy in '85? Did they buy in 2003? Did they buy in 1970? And they all have different rights. It's all the same rights. It's all the interpretation of this contract, which is what it is going forward.

The second argument that we've heard a lot is the Catwalk case.

THE COURT: Yeah, I read a bunch about that.

MR. FORD: And basically, this is a res judicata/collateral estoppel argument. I would encourage your Honor to read Judge

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Dukes' ruling, and I don't think it has anything to do with this case. But not only -- the South Carolina Court of Appeals has said this has no precedential value; it was an unpublished decision.

In any event, it was about different issues. It was about different parties. It had different documents and different facts. I'm not going to dwell on it a lot, but I do need to focus on it because I know my friend Mr. Elliott is focusing on it.

The Catwalk case was under the Declaratory Judgment Act. And there's black letter law that the declaratory judgment is not binding on nonparties. Mr. Stroup, Mr. Trager undisputedly were not part of Catwalk. There's no evidence they even knew about it a decade ago when that case was going on.

The Declaratory Judgment Act allows later litigation for the different parties and so on, and that's what we've got here today.

Catwalk was about something different. It was about commercial properties. In that case some commercial properties were saying that they were not covered by the 1970

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declarations, which we just talked about, because of a different set of covenants. That was the dispute here. We're talking about residential property and assessment power, which is different.

The question in Catwalk, for those commercial properties was, did the 1973 commercial covenants exempt those commercial properties from the 1970 declaration? Were they exempted, or were they covered by two sets?

The question here is, as I've said, it's a state-owned navigable water common property that belongs to the association. We submit those are two very different issues. And if you look at Judge Dukes' opinion, it doesn't have anything to do with dredging at all. It's not mentioned at all.

Neither Stroup or Trager were parties to Catwalk. They're not in privity; they're complete strangers to it. They're just not barred and collaterally estopped by a previous case they have no involvement with.

Our next argument that we've been confronted with is the Nonprofit Corporation

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Act. And to me, you know, this is -- basically the argument is the Nonprofit Corporation Act allows a POA to do what it wants. The word is -- unbridled power is what we keep hearing. Because there's a mention of that in the reporter notes, "unbridled power," which to me is a terrifying proposition that the POA would have unbridled power. But that's not really what the Non-Profit Act says.

This is the section -- basically what it says is it is subject to the articles of incorporation, which here confine this POA to common properties, if you read them. A nonprofit corporation has the same rights and powers as an individual, meaning they're bound by your contracts. They're bound by the governing documents; they're bound by the law of the property.

What the nonprofit corporation does not mean is that a POA can disregard its governing documents, disregard the limitations and the amendment provisions and so on.

The next point that we've heard a lot about is ratification. And basically, this is

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the -- the members have voted on past dredges before in the past 20- -- 1999, 2013, 2018. Sometimes they've approved them, sometimes they haven't for certain things.

And the argument here is, Well, they approved it in the past, so it must be okay in the future. And that is not what ratification is. In that scenario, no one has authority to -- ratification is when someone with authority approves an agent. Here there's no principal and agent relationship at all; it's just the members voted on this when it was put to them. But they don't have authority regardless to assess everyone in the community for their chosen cause, which is to dredge this public waterway, any more than they could vote -- for example, say they want to support a public school and it's really valuable to us, we love the school. We want to make everyone, everyone, fund this public school. They're free to fund it. They're free to contribute to the dredge. They can do that individually.

What they can't do is use their power as a fund-raising hammer to make every single person in the community who don't live on

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Braddock Cove, who live on the other side, live on different parts of the community, fund this cause of their choice. And ratification just does not extend to that.

And we have a slide, 15, which runs through those points, but it's essentially: You can't make power, when you never had power, just by voting. You can vote every day for a hundred years. It doesn't create a right where none existed.

Which brings me to the conclusion, your Honor. The key issue is under these documents, looking at the four corners of these documents, understanding there's a nonwaiver, a non-estoppel provision, can a POA -- this POA assess its members to dredge public waterways? And we say, under these documents, which say common properties have to be deeded to and belong to the association, and you can only assess to maintain common properties, it's ultra vires, outside of their legal authority, going forward to assess their members to dredge something that they indisputably do not own.

Thank you, your Honor.

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THE COURT: Let me ask you one other thing.

MR. FORD: Yes.

THE COURT: I was reading your brief and listening to your argument. It looks like the '85 -- 1985 modifications -- is some of your argument the fact that, basically, had they been tidier businessmen, they would have gone and -- it looks to me like, from reading some of your brief, they didn't make -- within the entire document, they didn't make the necessary changes to allow for a proper incorporation?

Is that -- I mean -- I was trying to read that and you were talking about, well, you know, this section doesn't apply, this doesn't allow this, because if you look at the 1985, it's inconsistent. I mean, is it an integration problem that you're arguing?

MR. FORD: It's essentially all sorts of problems. And we do have textual and conditions precedent that we go into in our brief that we incorporate. But, yes, they did it wrong. They couldn't amend it the way they did. They didn't meet the notification

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requirements on the face. So it's all that and what I've talked about.

THE COURT: All right.

MR. FORD: Again, I am trying to be efficient. I'm not going through every argument. I'm certainly not waiving them, but I can talk about any of them.

THE COURT: That's fine.

MR. FORD: Basically, back in 1985, this association had never owned property, didn't have any reason to exist. People back then -- some people really liked Braddock Cove, and they decided: You know what? We're going to just call this a common property.

So they unilaterally -- and I would respectfully submit, in just an improper procedure, filed something, and then just started charging everyone for it; and they're still doing it today, and they want to do it in the future. So we seek a declaratory judgment that, look, we're not trying to undo past things. But going forward, that's not what this contract means, and they can't do it. It's ultra vires.

THE COURT: Thank you.

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MR. FORD: Thank you, your Honor.

THE COURT: Mr. Elliott?

MR. ELLIOTT: Yes, your Honor. Judge, James Elliott for the defendant Sea Pines South Beach. Judge, I do want to thank you for helping us out and hearing this on a Friday afternoon.

THE COURT: Don't let anybody say Judges don't work on Fridays. I've only done this three years. I practiced a long time. But I'll tell you, there's more work on a Friday than I ever thought a Judge was going to do.

MR. ELLIOTT: I want you to know we appreciate it. Your Honor, just preliminarily, we, as the plaintiff did, adopt the briefs that we filed in this case and the initial pretrial brief. And unfortunately, I made a couple of errors with my Exhibit references, so I corrected it and got that to you guys as well. And also, we filed a reply brief to the plaintiffs --

MR. FORD: An opposition brief.

MR. ELLIOTT: -- a brief as well.

Unlike Ian, I am technologically challenged.

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MS. TILLMAN: Do you want to borrow my HDMI cable?

MR. ELLIOTT: It's fine. I'm just not typing well.

While he's doing that, your Honor -- so we've got a number of slides to go through. But I would tell you it's almost as if -- in our opinion, that it's game, set, match with regard to the statute of limitations. And I'll get into that much more later on.

But the 1985 modification, making Braddock Cove a common property, passed in 1985. I had just graduated from high school. I'm within -- at least I see a retirement now, you know, within my headlights. That's how long ago that happened. And that is the best argument that they have, that the statute of limitations hasn't expired and, therefore, prevents them from challenging the validity of the 1985 amendment to that covenant, is that's a sealed instrument.

The statute of limitations on a sealed instrument is 20 years. It expired in '05. They filed their summary judgment -- excuse me -- their Summons and Complaint in 2021. So

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16 years too late to even bring this action by way of attacking the validity of the modification.

And all their other arguments are based on whether or not that modification is valid. If the modification is valid and Braddock Cove is a common property, which it has to be because they missed the statute of limitations by 16 years, then the vote to dredge -- all the votes to dredge are based on that truth, which is that Braddock Cove is a common property and, therefore, you can maintain it. Therefore, if the community wants to, you can dredge.

Sorry, Judge. So, your Honor -- so the case is Catwalk, LLC, Mr. Stroup, Mr. Trager, versus my client, South Beach -- Sea Pines South Beach Owners' Association. South Beach is a little community in Sea Pines; it has about 500 properties or so within the community that have existed since 1970. Now, this is an aerial photo of the community.

THE COURT: Right.

MR. ELLIOTT: And the red line is mine. I just drew it to show you approximately where

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the community is. And I circled it. It's got -- portions of it face Calibogue Sound, portions of it is on Braddock Cove.

And you'll see that Braddock Cove obviously runs along -- you can see my cursor --

THE COURT: Yes, sir.

MR. ELLIOTT: -- runs along right here. This is the community right here. Obviously, not all the houses are on Braddock Cove. However, there's a good many of them, including Mr. Gossett and Mr. Catwalk's marina, which you can see where I'm circling with my cursor there.

THE COURT: Where is that?

MR. ELLIOTT: Right here. Do you see that?

THE COURT: Yes, sir.

MR. ELLIOTT: And what -- I grew up in the Lowcountry and am on the water all the time. And what I know about a cove is that it's not a creek, in that it doesn't drain from one -- out of each end. Right? It stops at the end of the creek -- at the end of the cove. And what happens is, when the tide

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comes in, it brings in mud, it brings in silt. It brings in whatever it does. And as it goes out, it doesn't take it all back out. So eventually, the cove will seal, silt in, the pluff mud will fill up. And eventually, without dredging, that cove will become a mud flat. There's no doubt about it.

And when it does, without dredging, it will smell. It will be unhealthy; it will be a problem for this community. And it will impact negatively the values of this community. There's just no question about that.

And the point is -- one of the points is, well, why are we -- why do you want to pay for the cove? That's like paying for a school in Orangeburg. It's like paying for a bridge in New York. How is it any different? It's different because it touches and concerns this property. It impacts this property. These folks have to have an -- they have an interest in keeping it clean, keeping it dredged, so it helps them maintain their values.

I'm going to show you some slides about investigations into property values and that

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sort of thing, and it's in my brief as well. But I think it's important to see what we're dealing with. This cove is intimately related with this community. There's just no doubt about it.

THE COURT: Well, particularly those that are on it.

MR. ELLIOTT: Particularly, I agree. But when folks -- I will say this: It seems self-evident to me. If you buy into a house at South Beach, you believe you have an amenity that is a creek -- right? You may not have a dock on it; you may not have a house on it. But that little sliver of land is on a creek. And hopefully, it remains a creek and not a mud flat, where you can't do much with it.

So what are the powers of the association and where do they come from? And a summary of the Declaration of the Covenants and Restrictions -- not what the document is called, Declaration of the Covenants and Restrictions. And Lighthouse Beach Company was the original developer. And what Lighthouse Beach Company said is they desire

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to provide for the preservation of values and amenities in the community for the maintenance of parks, playgrounds, boat channels and other common properties. And I understand other common properties at this time are defined as those that are deeded to the association or personal property that they call common property.

But there are no boat channels other than Braddock Cove. When this document was created, there's no other boat channels they had in mind to talk about.

THE COURT: Isn't that just kind of like headings that's not considered part of the statute? Isn't that just like a heading, the preamble?

MR. ELLIOTT: It is a pre- -- it's the introduction to the covenants, but it's outlining why -- what this developer is intending to do and why they're doing it. Because if you go down through the beginning -- excuse me -- through the introductory clauses, it says that they are creating the association to maintain/administer the common properties, because it deems it desirable for

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the preservation of the values and the amenities. The idea of this association is to do what is in the best interest of the community to preserve values.

In 1985, the association voted. They voted unanimously to amend the definition of common properties, and you've seen a copy of that. It doesn't say everybody in the community voted for it. The folks who showed up, got a forum, those folks voted for it. You saw in the papers that Mr. Trager said he didn't vote in favor of it. The reality is -- we took his deposition. He didn't go at all. He didn't show up to vote one way or the other.

And another point, the state owns this cove, but the plaintiffs have a right to use it just like anybody else. They have an interest in it for sure, and more of an interest in it than others because it touches and concerns their property.

And my PowerPoint is a little longer than Ian's, and I'm going to try to move on and not take so much time. But I go back to these are the highlights from Article 1 --

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excuse me -- Exhibit 1, the Declarations. It says, We desire to create the planned community with boat channels, et cetera; desires to provide for the preservation of the values and amenities in the community.

So that's what the developer wants to do, and he wants to do that by creating an agency. The agency he's creating is my client, Sea Pines South Beach Owners' Association. The initial -- I think Ian -- Mr. Ford showed this to you, I believe, the original common property definition.

THE COURT: Right.

MR. ELLIOTT: It says it shall mean areas of land with any improvements thereon deeded to the association, number one; the term also includes any personal property acquired by the association -- any personal property acquired by the association if said property is designated as common property. And it talks about the devotion of the common properties and common use.

Special assessments, there is an issue in Mr. Ford's brief about what you can use special assessments for. And he argues that

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you can't use it for dredging because dredging is not construction. But we'll get into that just a little bit later.

What the Declaration of Covenants and Restrictions say with regard to special assessments and improvements is they may levy special assessments for the purpose of defraying in whole or in part the cost of any construction or reconstruction, unexpected repair or replacement of described capital improvement upon the common properties, and then the vote has to be by three-quarters of -- three-quarters of the folks at a duly called meeting.

And that's what happened. That's what occurred in 19- -- excuse me. That's what happened when the dredges occurred and were voted on in 2001, 2013 and 2017. You can amend the covenants; the covenants tell you how you amend them. The Declaration of the Covenants and Restrictions, at Article 8, section 1, may be amended at any time if three-quarters of the vote at a duly called meeting of the association approves it.

That's what happened in 1985. They gave

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notice of the meeting to add Braddock Cove as a common property. And it passed, and it became a common property. The articles -- these declarations do not require that -- it doesn't prevent the association from amending the definitions in their Declaration of the Covenants and Restrictions.

It doesn't require that an amendment adding a common property be owned property. The plaintiffs talk about Article 2 with regard to additional added property that has to be deeded. That property -- that's property that someone else owns that is being added to the community that has to pay assessments and have voting rights. That's not what is going on here.

These folks voted to add Braddock Cove as common property because they want to take care of it. And the declarations and the covenants did not omit them from doing that. It allows them to do that.

There's a lot of discussion in the plaintiffs' brief about the covenants -- excuse me -- the declarations aren't covenants. I'd just ask your Honor to look at

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the title page of the documents, the Declaration of the Covenants and Restrictions, the entire document. The covenant is an agreement between all parties -- in this case, members of the association -- and it can be --

THE COURT: That's where he was talking in his brief about the fact that it was -- the definitions section or whatever is not in the covenant. Is that what you're talking about?

MR. ELLIOTT: I'm responding to that.

THE COURT: The title of the document is Declaration of Covenants and Restrictions?

MR. ELLIOTT: There's a section right above the definition, if you look at it, wherein they list things and they say, These sometimes are referred to as covenants. And it includes restrictions, it includes covenants, it includes assessments, it includes liens; it includes a whole bunch of things. And it says sometimes these are called covenants. And then -- (inaudible) -- lay it out. Right?

But if you believe their argument, the portion of the covenants -- the Declaration of the Covenants and Restrictions about who could

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be a member, not a covenant; if you believe what they're saying, the portion of the declarations about voting rights, not a covenant. A number of items within the covenant -- they only cite like three sections of this document that they believe meet the definition of covenants that can somehow be altered by the right to amend the declaration.

Your Honor, the 1985 modification -- you've been over this with Mr. Ford. Basically all it says is that common properties is going to include henceforth Braddock Cove in short.

And what the def- -- what common properties is, after 1985, everything you just read as to the original definition. However, add: Further, common property includes all boat channels, waterways, markers, marsh, open spaces, areas of Braddock Cove. Nothing prevents that from being done, not -- there's nothing that dictates that the definitions aren't covenants and that the definitions can't be amended. It's a contract. You can amend the provisions.

First, in the very beginning, I talked

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about 36 years later, now they're saying this modification is not valid. Thirty-six years later, they've done nothing. All the membership did nothing until Mr. Gossett and then his friends Stroup and Trager decided that Gossett was going to be dredging anyway, he owns the marina. Why should he be paying for an additional amount, because he's an association member, towards the dredging?

The modification is the foundation for the rest of their arguments about why we can't do what we did, what is done, which is the votes to dredge. The modification is valid; the votes are valid. The modification can't be challenged because it's too big.

A few points, covenant modification; it's our position and, unquestionably, it's the effort to preserve values, right, to self-impose a special assessment for dredging, a significant right for the South Beach community; the health and ability to use the waterways impacts the community.

I've already talked about the silt and the mud flat smells, property values go down. This was from a study related to ultimately

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the vote on the 2013 assessment. There was all sorts of studies done. Because you're digging up under a waterway, and DHEC requires you to do all sorts of things, the EPA does as well.

Within your papers is Exhibit 25, which is called a fish study. You have to look at damage -- well, how the fish are going to be impacted by this dredge. That's what it looks like. It may be low tide. I'm sure Mr. Ford will come in and say: That's low tide; that's low tide. But the reality is, who cares? It is low tide. That is a mud flat.

To tell you the truth, I'm not sure if the adjacent property right here is on our side or the other side, but that's a mud flat. The docks are on mud. The houses are overlooking mud. This is the back. And this is Braddock Cove. And you can check me out if you want. We can pull up Exhibit 25. They also studied Baynard Creek and another creek as well within that same study. Baynard Cove is worse, but these are Braddock Cove issues. This is a marina.

Just background information about the

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plaintiff: Trager's current interest -- Plaintiff Trager's came in 2017. However, he did purchase originally in 1983. Mr. Gossett and Mr. Vacation Inn -- the property -- I guess he's proceeding under here is Bluff Villas, which is a residential property gained in '03.

Gossett has all sorts of companies that own all sorts of properties within Beach Villas. And that evidence is -- I believe it's in the stipulation -- it's stip 7, that he's owned property since '84, bought more in the '90s, bought more in the 2000's.

Mr. Stroup, Sound Villas -- 1460 Sound Villas, he bought in 2003. They all participated in the dredge votes. So what Mr. Ford may say -- but the idea is they're being given an opportunity to participate in the democratic process within this community to have their voices heard. And if their will wins out, it wins out and there's no dredging.

Votes by 01, '13, '17, the dredge passed. This was lawyer math, and it took me a couple of times to make sure that I was right on 85 percent, 86 and 89. I could be

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wrong. But just in your documents, Exhibit 11, the meeting minutes of 2001, show the voting results. Exhibit 12, 13 meeting minutes, dredge assessment passes, 287-40; six had no opinion.

And this is not the best picture, but it's the July 18, 27 (sic), the meeting minutes. If you open your Exhibits, you can see it more clearly. It doesn't transfer so well onto the screen.

Mr. Stroup votes for it in 2013 for Exhibit 14. Now, the plaintiffs make the point that, Well, if you guys don't -- just because you don't participate in the dredge doesn't mean that it doesn't get dredged. Well, maybe. Maybe it's the benevolence of Mr. Gossett, because he's got a marina and he'll pay a bunch of money and he'll need it dredged.

But what if he doesn't? What if he decides to sell and someone who he sells to doesn't want to dredge anymore? What we do know, what happened in 2023 is that the dredging stopped at his marina. That's in the stipulation of facts in paragraph 23. I think

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that's a mistake. In your stipulation of facts -- you can read that. It stopped at his marina. It did not go all the way to the end of the cove, thanks to Mr. Gossett.

Modifications are -- I do feel like I'm droning on a bit. But the modification is valid. And I point to Judge Dukes' order in the Catwalk case because of some of the things he said in his summary judgment with regard to these are -- covenants are contracts.

The paramount rule of construction is to ascertain and give to the -- (inaudible) -- the entire document. You've got to look at this entire Declaration of Covenants and Restrictions and what was the developer intending to do and what rights, powers was he giving to the -- or intending to give to the association? And you can't read that document -- you can't look at the pictures of this community and conclude that doing something with regard to Braddock Cove wasn't a part of that; doing something to sustain the values of the property was not a part of that.

You can read Judge Dukes' order. He found the covenants provided the association

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with the authority to maintain and administer the community and collect assessments. Mr. Ford is correct. The appellate court rule with regard to unpublished opinions and how they apply, if you can't apply it to other cases -- but this is in the same vein. You're applying the appellate court ruling in Catwalk about the -- whether Mr. Gossett's property and others are governed by these covenants and, frankly, whether or not they're valid.

He had the opportunity to make all these changes when he brought the Catwalk case. He could have challenged for all the things that they're challenging for now, and he didn't do any of those. But he did -- and you'll see it mentioned. The assessment brought in about -- the idea of the assessment was brought in about 2013, and it was looking forward to that September 2013 vote on dredging.

We just talked about the covenants can be amended, the contracts, the Declaration of Covenants and Restrictions, the name of it. The definitions are just an agreement as to what the terms mean. I've talked about some of this.

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You have the right, based on what I reviewed through the governing documents, and what we'll get to is the law and what they did with regards to the modification.

Article 2, section 2, which is what Mr. Ford talked about, adding property. That's not what it's doing here.

THE COURT: What about this estoppel order?

MR. ELLIOTT: To me, it's a sub-argument. First of all, it's -- they're prevented from challenging the 1985 modification because the statute of limitations is blown. The estoppel is -- I wish I had a screen.

The estoppel -- the parties were denied the right to plead something they would otherwise have the right to do but can't because of something they did or failed to do. And the other party is prejudiced by what they failed to do or didn't do -- what they did or failed to do.

These plaintiffs took title with notice and knowledge after the 1985 modification. All three benefited and had the benefit in the

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past from the dredging. They participated in the votes. A large percentage of the association voted for it. The owners have 36 -- excuse me -- waterfront property, 36 years have passed. And this goes also back -- I've got a screen where I talk about the Jock Stender case, Maritime Container I think it is.

Why do we have statutes of limitations? So organizations, defendants can have some comfort level that after a long period of time, they're not going to be hauled into court by Mr. Catwalk, by Mr. Gossett in 2014. They're not going to be hauled into court by him again in 2021. If he loses here, they're not going to be called into court three years later. They need an end to this; they need an end to Mr. Gossett and Mr. Catwalk suing these folks.

That modification has been in place since 1985; the statute of limitations has expired. And that's the estoppel/waiver argument they've done. All the same sort of stuff applies. Yes, there's a nonwaiver clause in the declarations. But the nonwaiver

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clause says something to the effect that you don't waive your action if you don't enforce the covenant. That's not what they're doing here. That nonwaiver clause doesn't apply. They're not trying to enforce the covenant; they're trying to strike the covenant.

So that argument, that section doesn't apply here. They're trying to strike it, not enforce it. The nonwaiver applies in that fashion.

So -- you know, there's discussion about whether or not the special assessment can be issued for a dredge, and they argue that dredging is not construction. And in our papers and in the PowerPoint, I looked up the definition of construction. It has a lot of different definitions. One of them is to make ready for use.

Mr. Ford, in his brief, says, Hey, I can make my kitchen table ready for use. It doesn't mean it's construction. But you don't have to have a license to set your table. You do have to have a license to make a waterway ready for use. You do have to have a contractor's license to dredge or the DHEC

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folks won't give you a license. You do have to have a contract license to do anything with regard to a waterway. And that information is outlined in our brief and in our PowerPoint presentation.

And, you know, I point out that the permit itself says the work has got to be done by a licensed contractor. The permittee, the person seeking to have the dredge done, has to hire a licensed contractor. Dredging is construction. It would be like saying a site contractor in a subdivision, that's not construction because it's not building something up.

I represent a lot of site contractors, and all they do is push dirt around. That's construction. They have the license to do it. It's like saying if you build a footing for a house, that's not construction because nothing is going up. You have to have the footing in order for the concrete to build the house on.

In the brief, there were arguments about what I call procedural challenges. They say, Hey, you didn't give 60 days' time -- 30 days' notice before the 1985 vote. You may remember

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that. And they base that on the July -- I think the quitclaim deed of July 15, 1985. That's not proof that the association didn't 30 days before the vote send out a notice that, Hey, we're going to be asking you to vote to add Braddock Cove as a common property. That was a 60-day, less than 30 -- the 1985 modification adding Braddock Cove -- the document itself doesn't say when it's effective. The covenants require that there be a 60-day effect -- effective 60 days after the filing. It's self-satisfying. It is a matter of law that it's not effective until after the 60 days after they've filed it. They filed it in November of '85. It became effective 60 days later, under the terms of the covenants.

We talk about standing, your Honor. And that just goes back to -- these guys bought in. They knew what were they buying, and they shouldn't be able to challenge it 36 years later. We talked about the statute of limitations.

Flaws in the notice: An effective date has been ratified. Read the Jinks case, which

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Mr. Ford is very familiar with. It's his case. Ratification does not require that the initial action had been legitimate or authorized or legal. It wasn't. And it becomes authorized or legal because of the ratification.

And if you read that case, one set of defendants, their actions were not ratified -- I think it was AS -- the association of Sea Pines Owners' Association, their actions weren't ratified because they couldn't prove what the vote was. They couldn't prove how their people voted on whatever the initiative was. And so Judge Norton says it was not ratified; you couldn't prove that part.

We can prove how the votes occurred on the modification, which I believe ratifies, under the Jinks case, any improprieties like -- or not like -- but alleged failures in notice and effective dates.

And then, years later, when they vote to dredge, based on the modification, it ratifies any flaws on the modification by those votes years later. And I briefly outlined the elements accepted by the principals and the

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benefits of the agent. The principal is the members; the agent is the association. They had the full knowledge of the material facts, circumstances or an affirmed election had occurred.

So all elements are there. We outlined it in our brief. So any claims the plaintiff has that notice or effective date of the '85 modification, with or without merit, was a ratification.

The collateral estoppel -- different than equitable estoppel, is a little bit longer. And I don't know how much -- it's all in my brief. I don't want to belabor things. But if you read what Judge Marvin Dukes wrote in his order, he outlines important things: Like, these folks are challenging the applicability of the 1960 covenants and the assessments and special assessments. Right? He may ultimately -- and the ultimate conclusion is that the 19- -- their properties are encumbered by and subject to the 1970 covenants that we're dealing with here today.

But the reality is -- he certainly -- Mr. Gossett was arguing that he wasn't subject

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to the 1970 covenants because he was subject to the 1973 commercial covenants. But if you read the papers he's talking -- this all came about -- and I believe Judge Dukes notes that he's subject to the assessments and he's subject to the special assessments.

And when all that occurred, the 1985 modification was in place in 2014. Mr. Catwalk should have challenged the assessments and special assessments based on the 1985 modification if he believed that it was improper.

Judge Dukes finally held in the Vacation Inn case, Mr. Vacation Inn's properties were not exempted from the covenants but are, instead, encumbered by and subject to -- (inaudible).

THE COURT REPORTER: I'm sorry, James. What?

MR. ELLIOTT: I'm sorry. I'm mumbling.

Judge Dukes said that Mr. Vacation Inn, LLC, and his properties are not exempt from the covenants but encumbered by and subject to the covenants, including the amendments.

Judge Dukes' order says -- we've gone

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through this -- subject to the covenants, as amended, plaintiff contends they are not subject to the annual assessments or special assessments the covenants give the association authority to maintain and administer...

So the last elements of collateral estoppel, the issues necessary to support the prior judgment. The same issue here, whether or not these folks are -- these new plaintiffs are subject to the covenants, as modified, including the 1985 modification. Res judicata applies from Catwalk.

It's a prior judgment; the parties in the prior case were identical or in privity. Privity doesn't mean that they're the same person. It means they have the same interest with regards to the subject matter of the law. Privity means, in this case, that Mr. Catwalk/Gossett, Stroup and Trager all are property owners, subject to the covenants. And he, Mr. Gossett, was challenging the applicability of the covenants in the Catwalk litigation.

That's what the plaintiffs are doing here. They are challenging the applicability

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of the modification of the covenants to them in this case. And that is why we argue they have privity.

And based on the same causes of action, our position -- well, we won't go through all of that. Our position is that -- we'll run through this.

The same causes of action: Catwalk sought a declaratory judgment that his property was not encumbered by the covenants, not members of the association, no liability for assessments. Here, a breach of covenants in the nature of the contract, injunctive with declaratory judgment; and their injunctive is requesting that there be -- the association be enjoined -- the declaratory judgment stems from the alleged inability of the association to levy -- to assert special assessments for Braddock Cove, because the modification is valid.

Waiver, we talked about that. Estoppel, we talked about that. We talked a little bit in the brief about non-appropriate derivative action. I'll leave that for review unless you have questions. And actions barred by the

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ultra vires statute.

There's information in our brief about why the creek is important and the health of the creek is important to the property values. There was a task force put together by an organization, I guess the Association of Sea Pines Property Owners and CSA Board of Directors, in 2011. And they investigated, looked at the creeks, the health of them and what should be done with them, and concluded that the health of the communities -- the values in the communities are dependent on the creek and it should be dredged.

They talked about how it is a mud flat, my words; if the waterways aren't dredged, it's going to impact the golf tournament, it's going to impact tourism and, specifically, Harbour Town and South Beach Villas, our community, gate fees will be impacted, values of the homes will be impacted.

They did a survey about the -- a task force did a study on the effects of the community to take the temperature on how they felt about the need for the dredging. There's records in -- there's Exhibits in your

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materials about the board or our association sending out information about why they believe it's important to dredge and the impact on the values of the properties.

Exhibit 9 is similar.

And there's a long section in our brief and in this PowerPoint that talks about the powers that a community gains from the South Carolina Nonprofit Statute, the new version. And it talks about this section 31- -- 33-31-302 gives the association the power to do all things necessary and not consistent with the law in furthering the activities and affairs of the corporation. Yes, it can't be contrary to the powers and over and above the powers that are provided by way of the declarations and covenants. But the authority given to this community -- this association by way of the Declaration of the Covenants and Restrictions was to preserve the property values within the community. That's what the dredging is intended to do and the 33-31-302 supports that.

THE COURT: Okay.

MR. ELLIOTT: And the language in the

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covenants talks about broad interpretation. It talks about overturning or modifying or levering (ph), see Brinkley vs. Raben case.

Judge Norton, in the Jinks case, talks about broad interpretation of the powers under the statute. And what I just spoke about, which is the association is endowed with the power to provide efficient preservation of the values of amenities. Maintenance of the cove is not ultra vires. It's intra vires. It's within their powers to do it.

THE COURT: All right.

MR. ELLIOTT: I've taken up enough of your time, your Honor.

THE COURT: I gave him -- I'm going to give you ten minutes. Have you got anything else you want to tell me?

MR. FORD: If I could.

THE COURT: I had a feeling you would. So I'm going to give you a few more minutes.

MR. FORD: You know it, Judge.

THE COURT: Briefly, please.

MR. FORD: Gotcha. I'm not going to address everything James said. I think the brief on both sides are pretty thorough. I

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think James might have -- Mr. Elliott might have misspoken at times saying Catwalk is a part of this case. Catwalk is not a party in this case. I got a little confused. I want to make that clear.

This is about what the documents say, what they say. And I heard your Honor's question like, Well, they bought in 1985, they took title knowing that this modification was there.

And the point on that, Judge, is that even though it's of record, you know, this improper -- if it were true that when they bought -- and this was in the register of deeds, no one could ever challenge a POA on how they interpret the documents. And we know that's not the law of South Carolina. I've argued a lot of cases on both sides, that you can challenge it for future acts.

And that's what this is about. We're not looking to go back and unwind things. It's: What do these documents mean? It's a living document. Each new act, each new assessment is its own new act. And can it today, tomorrow assess these people for their

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chosen cause, which today is Braddock Cove, but not always -- again, they chose not to do it recently -- and in the future. So it's a declaratory judgment going forward. The statute of limitations doesn't affect that.

And we know they haven't waived anything by not protesting in the past because there's a nonwaiver clause. So I respectfully submit that's black letter.

Let me pivot to a very important point, and that is the structure of this community. And there are some diagrams in our brief. One is on page 26, one is on page 28 of our brief. And what they show is the structure of common properties and so on. And the one on page 26 shows the way it typically works under the law is if members pay assessment for a common -- to support a common property, then they have a reciprocal benefit; they have a right to use it, an exclusive right to use it. It's a common property owned by the association. That's how these documents -- this community was set up.

What this interpretation does is by changing one line -- purportedly changing one

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line, it changes it to the diagram on page 28, which eliminates all connection to Braddock Cove. There is no allegation by anyone here that the association is under any obligation to dredge Braddock Cove, and there's no reciprocal burden on Braddock Cove. The members get no right whatsoever as to Braddock Cove at all.

So they can't change the fundamental structure of the plan of the allotment for this community, and those two diagrams illustrate that.

I hear what my friend Mr. Elliott is saying; they think that Braddock Cove raises their property values. They think that. There are also burdens that would come with that. But just because something may be pleasant and desirable -- a school across the street -- it doesn't mean they can just annex it into their common properties and assess everyone to support that school. They can contribute to it. They're free to voluntarily contribute to Braddock Cove, people apparently will, but they can't assess people like Mr. Stroup who doesn't live on it and force him to

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do that. They can only do that for something that is legitimately a common property brought within the plan of development for this community.

And they can file a modification every year for the next century, and it doesn't change that core fact. You have to bring a common property within the plan of development for the association like those diagrams show.

They do -- the modification has a lot of problems. But it says, These are the kind of things that may be brought into the common properties. That's what it technically says. The waterways of Braddock Cove may be brought. It doesn't say they are -- "may be brought" in. There's a process. And that is in the next section.

It says it has to be deeded by the owner to the benefit and subject to the jurisdiction. So even on its face -- the 1985 modification is invalid, but even on its face what it says is you may bring these things. It says land; we're saying you can also bring in Braddock water -- Braddock Cove if you want, but they still have to follow the

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mandatory process, deeded by the owner, as I said.

The Jinks case, I would respectfully submit that's on the ratification. Your Honor, set that aside. We argued that to the Fourth Circuit the other day. They looked very unfavorably on CSA's ratification argument.

I would respectfully submit we all wait on the Fourth Circuit to issue a ruling on the Jinks case; set that one aside just for the moment. And what I would like to do now is my colleague, Ms. Tillman, is going to talk property law issues. She's our guru on property law. My remaining ten minutes I'd like to concede to her with your Honor's permission.

THE COURT: Your remaining five minutes.

MR. FORD: Yes, sir.

MS. TILLMAN: Four minutes to cover 180 years of property law in South Carolina? I can do it.

THE COURT: It sounds like studying for the Bar.

MS. TILLMAN: It should be no problem.

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Your Honor, I heard your question -- it was a good one -- right at the outset. And you asked Mr. Ford: Are we talking about just this particular association, or could some other association possibly do this?

And here we're only asking for a ruling on this association and its governing documents. But respectfully, its governing documents follow the law of South Carolina -- the property law of South Carolina, which is on how reciprocal covenants and restrictions are brought into effect and then carried on from titleholder to titleholder and run with the land.

And the key to that is this question of touch and concern. And what does it mean for a real covenant to touch and concern the land? And you heard Mr. Elliott say, Well, they're nearby; they're right adjacent to Braddock Cove. And so this desire to maintain Braddock Cove touches and concerns their land. And he said, and, therefore, they have an interest in it.

THE COURT: Let me ask you that. Because it brings up a question that I forgot

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to ask. Within Braddock Cove -- or within the community, do members of the community whose property does not touch Braddock Cove, do they have access to parks, common areas, a place to put in a boat or a canoe -- do they have any -- do they have any access to that?

In other words, you know, you go down to Kiawah or go somewhere where it's all private, you don't have any access to it. So my question is, you've got, say, 500 units in there, maybe 150 touch the cove. Do the people who have units in there that don't touch the cove, do they have access to common spaces that do touch the cove? That's my question.

MS. TILLMAN: That's a great question. The answer is they do, but not because the association controls Braddock Cove. But instead, because they're members of the public. You, not being an owner anywhere in that community, could go to Braddock Cove. You could take your boat.

THE COURT: I'm not talking about that. I'm talking about a property owner. Because it's a gated community. So what I'm talking

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about is if a property owner -- he's got a piece that's worth a million because it's sitting there on the water or mud, depending on the situation -- 500 if it's on the mud.

And so what happens is this guy here, okay, he's from Walterboro, and he's got a little unit right here that may be only worth 299. So my question is, does the guy who has the 299 unit -- does he or she have somewhere they can walk or take a grandkid and have access to that creek? Is there a common area --

MS. TILLMAN: Yes.

THE COURT: -- where there's a playground or a launch or -- that's what I want to know.

MS. TILLMAN: What a great question. The answer is no. There is commercial property that has docks and restaurants and things like that. And Mr. Stroup, who does not own waterfront property, could go that way to enjoy the water. But this -- this owner's association doesn't have any common property. There are no parks that abut the waterway. There are no playgrounds that abut the

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waterway.

THE COURT: I know they don't own any property. That's been made abundantly clear. I guess what I'm asking is, because now we start playing this word game, I'm asking, is there -- do they have somewhere where these people go? And to your knowledge, the answer is no?

MS. TILLMAN: No. And it's more than a word game. Touch and concern is a legal term of art. And you heard Mr. Elliott say --

THE COURT: Well, my concern is, if they have an ability to touch by some access within a gated community that allows everybody back here to go and use that cove, I mean, I can't believe that's not touching.

MS. TILLMAN: So touch and concern -- I would ask you to read the case law on touch and concern. Because what it means is a real property interest right and corresponding obligation. That's what touch and concern means. Otherwise, I could go touch the Hardee's down the street and say that I'm touching and concerning this Hardee's.

THE COURT: If you get past the gate to

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get in there; this is a gated community and not open to the public.

MS. TILLMAN: Actually, the public can come into this community and can pay --

THE COURT: Pay $7?

MS. TILLMAN: You probably did that. It could have been $12, raised for the Heritage. But the point is, the touching and concerning means a corresponding reciprocal property interest. And that is very different from just being nearby or adjacent to it. And, you know, otherwise any property that was near your property, you could argue that yours touches and concerns that. That's not what it means. It's a legal term of art, and it represents a real property interest.

And the way this declaration is set up is to give people that real property interest, that touch and concern interest in common properties. And it does that on that page on the easements. If this were done correctly, Mr. Stroup would have an appurtenant easement on Braddock Cove, if it were actually a common property.

And the reason that could happen is

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because the owner of Braddock Cove deeded it to the association so the association then says I'll give you an easement. It has a right to do that.

The association, though, doesn't own Braddock Cove. The State of South Carolina does, and it has --

THE COURT: The association owns no property.

MS. TILLMAN: I know. We keep coming back to that, but, boy --

THE COURT: I've learned that. I'll go home tonight and think about that.

MS. TILLMAN: You should lose sleep over it, really. But no common property and unbridled power; what could that mean? But I would just ask, your Honor, to read -- Mr. Elliott says, It's a contract; you can amend it. But -- you can amend it. But real covenants cannot be understood -- and this is -- Judge Kittredge will tell you this all day -- cannot be understood without reference to real property at law.

And this is more than just a contract. It's something that is intended to run with

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the land and, therefore, it's got to touch the land. And I'm glad to answer any questions you've got on it.

THE COURT: You've answered my question.

MS. TILLMAN: Thank you very much.

MR. ELLIOTT: So the answer --

THE COURT: Two seconds.

MR. ELLIOTT: -- to the question is, yes, the folks who own a $200,000 unit can access within the community. They have access to the cove. They have access to --

THE COURT: Across what property?

MR. ELLIOTT: Say it again.

THE COURT: Across what property? I guess -- if somebody has got a commercial business -- I'm not talking about a commercial venture. I'm talking about a lot or they own no property, but, you know --

MR. ELLIOTT: The CSA owns a part within the community that my client, if they ever sell it, they have a right to first refusal to buy it. And they can access it. And then, your Honor, you can read the case law on touch and concern. If the -- if the property that is being maintained impacts the value of

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demised property, it does touch and concern. And I just looked at their cases from Ewing v. Lexington; Neon Property Owners and the Harbison versus Mueller.

THE COURT: Thank you. I think I've got what I need. I'll let you all know something in a couple of weeks. All right?

MR. FORD: Thank you, your Honor.

MR. ELLIOTT: Thank you.

(The hearing concluded at 3:27 p.m.)

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C E R T I F I C A T E

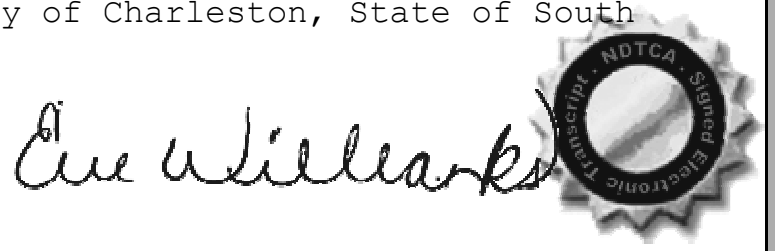
STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically report the foregoing hearing; and that the transcript is a true record of the statements given by the parties.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 13th day of January, 2025, in the City of Charleston, County of Charleston, State of South Carolina.



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Eve Wilbanks,
Registered Professional Reporter
and Notary Public

My commission expires:
October 3, 2034

Electronically signed by Eve Wilbanks (101-177-349-6970) d46f5d1e-22e9-4297-a54e-804872fc10ac